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THE

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Equity Cases,

INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

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NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

In re BARNED'S BANKING COMPANY. *Ex parte* JOINT STOCK DISCOUNT COMPANY.

M. R.
1874
Nov. 7, 14.

Securities to meet Bills of Exchange—Insolvency of all Parties to Bills—Application of Securities—Ex parte Waring—Reduction of Proof.

All the parties to a bill of exchange (the payment of which was secured as between some of them) became insolvent, one of them (a company) being ordered to be wound up. The security was realised, and the proceeds paid to the bill-holder upon the principle of *Ex parte Waring* (1). After the bill had matured, but before the security had been realised, the holder had proved against the company for the full amount:—

Held, that the proof must be reduced by the amount received by the bill-holder from the security, and any dividends received on the excess of the original over the reduced proof must be refunded.

THIS was an application by the *Joint Stock Discount Company* that certain sums might be paid to the *Joint Stock Discount Company* by the liquidators of *Barned's Banking Company*, as further

(1) 19 Ves. 345.

M. R. 1874

In re BARNED'S BANKING CO. *Ex parte* JOINT STOCK DISCOUNT CO.

dividends on certain bills of exchange which had been proved in the winding-up of *Barned's Banking Company.*

The bills in question had been indorsed by (amongst other parties) *Barned's Banking Company,* and the payment thereof had been secured by mortgages of one or other of the following ships: the *Juventa,* the *Gambia,* the *Lady Rowena,* the *British Princess,* and the *Great Victoria.* In every case the drawers, acceptors, and indorsers of the bills had become insolvent, and the bills had been proved against the estates of all of them by the holders. The claims of the holders had been satisfied partly out of the proceeds of the sale of the ships, and partly by dividends paid by the liquidators of the *Joint Stock Discount Company.* This company (which was in liquidation) had indorsed the bills subsequently to *Barned's Banking Company,* and had now become entitled to the benefit of the proofs against the drawers, acceptors, and prior indorsers of the bills.

The *Juventa* belonged to Messrs. *Crocker & Co.* of *Liverpool,* and was mortgaged by them to *Barned's Banking Company* to secure payment of certain bills drawn by *H. F. Currey & Co.,* and accepted by *Crocker & Co.,* and discounted by *Barned's Banking Company,* who subsequently indorsed one of the bills to the *Mercantile and Exchange Bank of Liverpool;* and it was agreed between *Barned's Banking Company* and the *Mercantile Exchange Bank* that the latter should have the benefit of the mortgage. The ship was sold by the liquidators of *Barned's Banking Company,* and the proceeds of sale were distributed among the holders of the bills of exchange secured by the mortgage under an order made by the Court in the winding-up of *Barned's Banking Company.*

The *Gambia* belonged to *Henry Lafone,* and was mortgaged by him to Messrs. *Fernie Brothers* to secure an advance by them on certain bills drawn by him on them, or any sums in which he might become indebted to them on account current. These bills were afterwards renewed, and the renewals were discounted with *Barned's Banking Company,* Messrs. *Fernie* agreeing that the mortgage should be held by them in trust to secure the due payment thereof. *Lafone* afterwards gave a second mortgage of the ship to *Barned's Banking Company* to secure all moneys due or to become due from him to the company, including any moneys

M. R.
1874
In re BARNED'S BANKING CO.
Ex parte JOINT STOCK DISCOUNT CO.

which they might pay, or become liable to pay, on his account, either alone or jointly with any other person or persons, whether on any bill of exchange, promissory note, cheque, order, or other contract or security, current or overdue. The ship was sold by the liquidators of *Barned's Banking Company*, and the proceeds were distributed among the holders of the renewed bills by direction of the Chief Clerk, but without any order for the purpose being drawn up.

The *Lady Rowena* belonged to Messrs. *W. H. Daunt & Co.*, and was mortgaged by them to *Barned's Banking Company* to secure certain drafts of Messrs. *W. H. Daunt & Co.* on Messrs. *Henry Whittle & Co.*, who accepted those drafts upon an undertaking by *Barned's Banking Company* to provide them with funds to cover the acceptances prior to their maturity. The ship was sold by the liquidators of *Barned's Banking Company*, and the proceeds distributed among the holders of the said drafts, by direction of the Chief Clerk, but without any order for the purpose being drawn up.

The *British Princess* belonged to Messrs. *Fernie*, who sold it to Messrs. *W. H. Daunt & Co.*, and received in payment bills of exchange drawn in favour of Messrs. *Fernie* by Messrs. *W. H. Whittle & Co.* on Messrs. *W. H. Daunt & Co.*, who accepted the same; and in order to secure the payment thereof sixty sixty-fourths of the vessel were transferred into the names of Messrs. *Henry Whittle & Co.*, who agreed to apply the proceeds of any sale in retiring the said bills, or any renewals thereof. *Barned's Banking Company* took the bills in the market without reference to the security. The ship was sold by the trustee in the bankruptcy of Messrs. *Henry Whittle & Co.*, and the proceeds were distributed by him among the bill-holders, without any order for the purpose being obtained.

The *Great Victoria* belonged to Messrs. *James Baines & Co.*, and was mortgaged by them to the *British and American Steam Navigation Company* to secure certain bills drawn by Messrs. *Baines & Co.* on the *Navigation Company*. That company accepted these drafts at the request of *Barned's Banking Company*, who undertook to provide the *Navigation Company* with funds to retire the bills at least seven days before the maturity thereof. The ship was sold after the bills became due, and the proceeds were distributed

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among the bill-holders without any order for that purpose being obtained.

Certain of the bills secured by each of the aforesaid securities came into the hands of the *Joint Stock Discount Company*, who afterwards indorsed them away. Neither the *Joint Stock Discount Company* nor the parties who proved in respect of them took any transfer to themselves of the benefit of any of the aforesaid securities. The payments to the bill-holders out of the proceeds of the securities were all made after proof.

The liquidators of *Barned's Banking Company* insisted that the proofs in respect of the bills now held by the *Joint Stock Discount Company* ought to be reduced by the amounts paid to the bill-holders out of the proceeds of the sale of the aforesaid ships; and they had paid to the *Joint Stock Discount Company* dividends on the amounts of the proofs so reduced. The *Joint Stock Discount Company*, on the other hand, claimed to be entitled to receive the dividends on the full amount of the proofs; and the present application was made with the object of enforcing that claim.

Mr. *Roxburgh*, Q.C., and Mr. *Romer*, for the *Joint Stock Discount Company*:—

If the payments in question are simple payments after proof, then, even in bankruptcy, the proof is not reduced in respect of them: *Warrant Finance Company's Case* (1). If the payments have been made in respect of a security realised (as we submit they were), then in Chancery and in winding up the creditor's proof is not affected by such payments: *Mason* v. *Bogg* (2); *Kellock's Case* (3). It may be said that in those cases the security belonged to the creditor who proved; but it would be absurd to hold that a proof is not to be reduced if a creditor realises his own security and applies the proceeds in part payment of his debts, but that it must be reduced if he accepts the proceeds of another person's securities in part payment.

The other side may rely on *Coupland's Claim* (4) and *Banner* v. *Johnston* (5). But those cases are clearly distinguishable; for in

(1) Law Rep. 5 Ch. 88.
(2) 2 My & Cr. 443.
(3) Law Rep. 3 Ch. 769.
(4) Ibid. 5 Ch. 167.
(5) Law Rep. 5 H. L. 157.

both of them the creditor who proved was party to a security which provided that the debtor was only to be liable for the difference between the debt and the proceeds of the property comprised in the security. Here, neither the *Joint Stock Discount Company*, nor the parties who proved, have entered into any such contract; and, in fact, none of them entered into any contract whatever, or had anything to do with the securities.

It may be further contended that these payments were made by virtue of the rule in *Ex parte Waring* (1); and that the creditors having taken the benefit of that rule must also bear the burden.

But, in the first place, there is nothing to shew that the payments were made under that rule; in several of the cases the payments were made without any order being obtained for the purpose; and in the cases where orders were obtained, those orders are silent both as to the ground of the order and as to the reduction of the proofs. If the proofs were to be reduced at all, the orders made for the distribution of the proceeds of the ships ought to have contained directions to that effect.

We do not come here under the rule in *Ex parte Waring*, but under the equitable doctrine laid down in *Powles* v. *Hargreaves* (2) and *City Bank* v. *Luckie* (3). That doctrine is, that where, as between drawer and acceptor, security has been given for a bill, and both drawer and acceptor become insolvent, then, in order to avoid the deadlock which would otherwise take place in winding up the estates both of drawer and acceptor, the Court will realise the security and pay the proceeds to the bill-holder; but the doctrine says nothing as to the consequences of such a payment; and it may be that in bankruptcy the proofs would be ordered to be reduced, as appears to have been done in *Ex parte Waring* (4), although there is no trace in the judgment of any decision on this point: but it does not follow that the same thing would be done in Chancery or in winding up. In fact, such a thing as the reduction of a proof in Chancery is unheard of.

Again, in *Ex parte Waring* the order was for reduction of the proofs against the estates of the parties to the security; here *Barned's Banking Company* had nothing to do with the security

(1) 19 Ves. 345.
(2) 3 D. M. & G. 430. 17 Jan 1083
(3) Law Rep. 5 Ch. 773.
(4) See 3 D. M. & G. 435, n.

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on the *British Princess;* and the proof against that company on the bills for which that security was given ought not to be reduced, whatever may be the decision of the Court as regards the other proofs.

[They referred to *Ex parte Maxoudoff* (1); *Forwood's Claim* (2).]

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for *Barned's Banking Company*, were not called on.

Sir G. Jessel, M.R.:—

It appears to me that I am bound by the decisions. I cannot see any distinction between the different ships in this case: the same principle seems applicable to all. Certain bills were secured, in some cases as between the drawer and acceptor, and in other cases as between the drawer and indorser, by a mortgage on a ship, which was to secure either specific bills or balances due, or something of the sort; in other words, there was the ordinary security providing that the bills were to be paid out of the proceeds of the ship; and, as I understand *Coupland's Claim* (3), it was there held that, as between the parties to the security, the proceeds were to be applied in payment of the bills in the first instance, and the bill-holders so secured could only prove for the balance. That was the decision as between the parties to the security. Here the bills got into the hands of third parties, who proved on the bills under the winding-up of the different indorsers, and, among others, of *Barned's Banking Company*, which is the company in whose winding-up this present application is made; and I have now to decide what is the position of those third parties as regards the securities of which they have had the benefit.

Throwing, for a moment, out of consideration the cases where *Barned's Banking Company* was a party to the security, let us take the case where *Barned's Banking Company* was not a party to the security, but simply indorsed the bill without knowledge of the security. After the winding-up commenced the ships were sold and the proceeds paid to the bill-holders, who had taken the

(1) Law Rep. 6 Eq. 582. (2) Law Rep. 5 Ch. 18.
(3) Law Rep. 5 Ch. 167.

bills without any knowledge of these ships being held as security. The bill-holders claimed the proceeds as of right, and they were paid to them as of right. They made that claim under the doctrine of *Ex parte Waring* (1), which has been so emphatically repudiated by the counsel for the applicants on the present occasion, and they got payment under the idea of all parties that this doctrine applied to the case in question. It has not been disputed at the bar, and in fact it has been admitted, that that doctrine does apply to a case where all parties to a bill are insolvent, although none of them may be bankrupt. I have not, therefore, to consider the question which was thought doubtful by Lord Justice *Turner* in *Powles* v. *Hargreaves* (2); though if I had to consider it, I should treat the judgment of Lord Chancellor *Cranworth* as conclusive on the point.

That being so, what is the doctrine? In the case of *Ex parte Waring*, the question was whether the bill-holders who held the bills drawn by *Bracken & Co.* on *Brickwood & Co.* could get the benefit of certain short bills and securities deposited by *Bracken & Co.* with *Brickwood & Co.* to secure the payment of the bills. At the time when the bill-holders asked for the proceeds of the deposited securities they had not only proved against the estates both of *Bracken & Co.* and *Brickwood & Co.*, but had received dividends: this is a point not to be forgotten. Lord *Eldon* says this (3): "The first consideration is, what was the nature of the demand of *Bracken & Co.*, who did not become bankrupt until August, upon *Brickwood & Co.*, at the moment of their bankruptcy on the 7th of July. If these bill-holders are to have payment in preference to the other creditors, it must be by the effect of an equity between those two houses, rather than by any demand directly in their own right upon any fund in the hands of *Brickwood & Co.* With regard to the demand of *Bracken's* house upon the 7th of July, it is impossible to deny that if they had either paid, or undertaken to pay, *i.e.*, to relieve *Brickwood's* house from those acceptances, the short bills and the mortgage must have been restored to them. It is, on the other hand, equally clear that they never could have raised

(1) 19 Ves. 345.
(2) 3 D. M. & G. 430.
(3) 19 Ves. 349.

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any demand against the house of *Brickwood* in respect of either the cash balance, the short bills, or the mortgage, without bringing in the amount of those acceptances, admitting that what the house of *Brickwood* had of their property in short bills, &c., must be first applied to the discharge of those acceptances, for the sake, not of the bill-holders, but of the house of *Brickwood*." Now, what does that mean? As I read it, he means that the contract between the houses of *Bracken & Co.* and *Brickwood & Co.* was, that the proceeds of the securities should be applied in discharge of the bills, and not only in discharge of the bills, but in discharge of the bills in the first instance, taking the same view of the contract in that case as was taken of the contract in *Coupland's Claim* (1) and in *Banner* v. *Johnston* (2) by the tribunals before whom those cases came, which was, that the proceeds of the goods or securities pledged should be applied in payment wholly or *pro tanto* of the amount of those bills. Now, that that was Lord *Eldon's* view is plain from the order (3), which directs that "it be referred to the Commissioners of Bankruptcy against *Brickwood & Co.* to take an account of the bills outstanding and accepted by *Brickwood & Co.*, and in whose hands such bills now are, and what is now remaining due to the holders on the said bills respectively; and that the Commissioners take an account of the dividends paid or now liable to be paid by the assignees of *Brickwood & Co.* to the said bill-holders upon the proofs made by them on the said commission; and that the short bills now remaining unpaid be forthwith sold before the Commissioners under the commission against *Brickwood & Co.;* and let the net proceeds of the short bills already received by the assignees of *Brickwood & Co.*, and the amount of the net proceeds to arise by sale of the said short bills hereinbefore directed to be sold, and the said £2961, after payment thereout of the costs and expenses hereinafter mentioned, be deducted from the aggregate amount of the bills outstanding and accepted by *Brickwood & Co.;* and let the several holders of the said bills stand creditors under the commission against *Bracken & Co.*, and under the commission against *Brickwood & Co.*, for the difference, in

(1) Law Rep. 5 Ch. 167. (2) Law Rep. 5 H. L. 157.
(3) See 3 D. M. & G. 445, n.

proportion to the amount of the said bills which they severally hold, and let their respective proofs be reduced accordingly under the said commissions; and let so much of the dividends which the assignees of *Bracken & Co.* have paid in respect of the said proofs in the sums so to be deducted be refunded to them by the said bill-holders in proportion to the amount of the said bills which they severally hold." Then there is a similar order as to the dividends paid by the assignees of *Brickwood & Co.*; so that it is plain that Lord *Eldon* not only reduced the proofs, but he made them pay back the dividends. In other words, the equity he administered was this: he treated it as if the securities had been realised at the moment of bankruptcy, disregarding the fact that by the nature of the case they were not realised until some time afterwards; he held that at the moment of bankruptcy the amount arising from the security so realised ought to have been paid over to the bill-holders; and he treated the case as if the proceeds of the security had been actually so paid over, and therefore the bill-holders ought to have proved for so much less; and on that ground he reduced their proofs and made them take so much less. That seems to be the view he took. I cannot understand his order in any other view, because, as Mr. *Romer* has pointed out, if those were payments after proof, there is no principle on which you could reduce the proof and take back the dividends. But if Lord *Eldon* took the equitable view, that the mere realisation of the security was an accident, and that you must treat the case as if the security had been sold or realised at the moment of the bankruptcy, the whole thing becomes intelligible. He orders the proceeds to be applied as they ought to have been applied, and he treats the proofs as reduced *ab initio*. That appears to be the same view as was taken of the nature of the securities in the two cases of *Coupland's Claim* (1) and *Banner* v. *Johnston* (2). Those cases do not bear directly upon this case, because in them the decision turned only on the interpretation of written instruments; in both, however, it was held that the moneys received from the realisation of securities for bills are to be applied in the first instance in the payment of the bills; and further, that these moneys are to be treated as so

(1) Law Rep. 5 Ch. 167. (2) Law Rep. 5 H. L. 157.

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applied *eo instanti* the bills become due; so that there never ought to be a proof for anything beyond the difference. That seems to me to reconcile the authorities; and when I come to look at Lord *Cranworth's* judgment in *Powles* v. *Hargreaves* (1), it seems to me that he has disposed of a great deal of the argument addressed to me on the present occasion.

In *Powles* v. *Hargreaves* there was only one bankruptcy. Strictly speaking, even that bankruptcy did not exist, for it had been superseded upon a composition deed being executed, which contained a clause that the assets should be distributed according to the Rules in Bankruptcy. Lord Chancellor *Cranworth* took a general view, which is the view, at all events, presented by the counsel for the applicants, and appears to be the correct view, namely, that the doctrine has a wider application than bankruptcy, that it applies to every case where all the parties to a bill are insolvent, and is an equity to be administered for the reasons which Lord *Eldon* puts so forcibly, viz., that in order to put matters in the right position as between the original giver and receiver of the security, you must apply the proceeds of the security to the payment of the bills, not for the sake of the bill-holder, not as a kind of security to him, but as a mode of working out the equities between the insolvent estates of those two original parties to the security.

But if the bill-holder takes money to which he is not entitled in any way, except as a means of working out that equity, the question then arises as to the terms on which he takes it, and it appears to me that those terms are, that he is to take it as paid at the first moment when the securities ought to be realised. That will generally be when the bill becomes due; though, possibly, in cases where the bill became due after the insolvencies, it may be that the equity would arise as soon as the insolvencies began, because an unpaid bill, probably everywhere else except in this country, and even in this country in cases of bankruptcy, is treated as payable or proveable when the acceptor, drawer, or person liable to pay becomes insolvent.

Now, in *Powles* v. *Hargreaves*, so far as appears from the report, the bill-holders who claimed the benefit of the security were

(1) 3 D. M. & G. 430.

holders in the first degree—at least it does not appear that there were any in the second degree. What I mean is this, that the mercantile house who had accepted the bills was secured by goods, and, as far as I can see, the bill-holders who were Plaintiffs were the persons who had taken them direct from the secured house. There, however, is no distinction made between holders in that position and subsequent holders; and I have no doubt, considering there were a great many bill-holders, that a very large number of bills had got into third, fourth, or fifth hands. The actual Plaintiffs, however, appear to have been holders in the first degree. The first argument was that the doctrine only applied where there was enough to pay the bills, and not where there was a deficiency; and what Lord *Cranworth* says is this (1): "I confess I was at first a good deal struck with that argument. With the view of ascertaining exactly what was done in *Ex parte Waring* (2), and whether the order as drawn up in that case would throw light upon the subject, we sent for the order itself. It may, I think, be inferred from the judgment in the report of that case that the securities deposited were more than sufficient to satisfy the bills. I do not know that that distinctly appears in the report, but whether it was so or not is immaterial, because the order itself (which I must assume was very fully considered, for Lord *Eldon* directed the attention of Mr. *Cooke* to the mode in which it was to be drawn up) distinctly provided for the case of the short bills deposited either being equal or more than sufficient, or being insufficient; and expressly provided that if insufficient the parties holding the acceptances were to prove for the deficiency. Is that at all surprising when we consider the case a little more closely? That of necessity must be the equity, because when, as in the present case, the goods were deposited under circumstances that the parties with whom they were deposited had a right to hold them as security, it is to be observed that from the nature of the transaction it was meant either by express contract or in the ordinary course of dealing with the property, that it should be turned into money: when that is done, it is absurd to speak of holding £8000 by way of security for being paid £16,000. That is not the course of dealing. When it is once said that goods or bills are

(1) 3 D. M. & G. 452. (2) 19 Ves. 345.

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deposited by way of security on a contract that when the proper time arrives those securities are to be realised and turned into money, what is necessarily meant is that the money is then to be applied just as property sold under a power of sale in a mortgage is to be applied in liquidating the demands for which it is a security if sufficient; if not sufficient, in liquidating such demands *pro tanto*." In other words, he says the course of trading would be to turn the property into money in time to pay the bill. He speaks of the proper moment arriving for payment, and (as I understand him) says the security ought then to be applied in payment of the bill, according to the true meaning of the contract between the parties. He continues: "It seems to me, therefore, that the circumstance of the proceeds of the remittances here not being sufficient does not at all vary the equity of the case, but that the right of the bill-holders is just as it would be if the securities had been more than sufficient to satisfy their bills, as it was held in the case of *Ex parte Waring* (1), if there the securities had been insufficient. The Plaintiff and those on whose behalf he sues"—that is, all the bill-holders—I have no doubt that many of them were much farther off as indorsers than the Plaintiff, and no distinction is suggested on that ground—"are entitled to have what is in specie, namely, the £8040, applied in the first instance in liquidating their demands, and, following the principle of *Ex parte Waring*, they are to be at liberty to prove for the deficiency." He therefore recognises the principle of the proof being for the deficiency; that is, the payment in respect of the security is not a collateral payment, but it is a payment in the first instance which ought to have been made as soon as the bills were due, the mere delay in selling the property making no difference. He afterwards adds: "We think that part of the decree must be varied by substituting a clause to the effect that the decree is to be without prejudice to the parties making such claim for the balance as they may be entitled to under the trust deed, in order to exclude the notion that they can prove for anything more than the balance." That is, he not only would not allow them to go in and prove and then take the £8000; but he actually varies the decree in order to exclude the notion that they can prove for anything more than

(1) 19 Ves. 345.

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the balance. Well, it does appear to me, on looking at that judgment, that he has decided the point now raised, that he has treated the rule in *Ex parte Waring* (1) as being this, that the proceeds of the security are to be applied, as Lord *Eldon* puts it, in discharge, and in discharge in the first instance, and to be applied at the time when they ought to have been applied; that is, at the latest, as soon as the bill becomes due, because that is the time when the security ought to be made available. The mere fact that there was some delay in realising that security, he does not seem to consider—and in equity we are not accustomed to consider such inevitable delays in realising property—as affecting the rights of the parties in any way. In that way it does appear to me that the order of Lord *Eldon* is perfectly reconcilable with the judgment of Lord *Cranworth*, and can only be made intelligible on that ground; because, if it were not so, on what ground do you make a creditor reduce a proof and hand back dividends? It is not a security to him; if it had been a security to him, he must in bankruptcy have deducted it from the proof in the first instance. Then it is not a payment after proof; for there can be nothing better settled in bankruptcy, and no rule less open to dispute, than that payment by a third party after proof does not reduce the proof—still less can it make the creditor pay back the dividend. Therefore Lord *Eldon* must have decided on the same principle that Lord *Cranworth* puts it on, and on the principle upon which *Coupland's Claim* (2) was decided, that the real contract is to apply the moneys arising from the security in the first instance and at a period at which they ought to have been applied—that is, at the period when the bill becomes due—in payment of the bill *pro tanto*. Therefore a creditor who comes in to take advantage of the rule in *Ex parte Waring* as bill-holder, must take the rule as he finds it, that is, must apply the proceeds at that particular time in reduction of the amount of his bills: consequently he never ought to have proved for more than the difference, and if he could not help it because at that time the security was not realised, and he did not know the amount for which he ought to have proved, then when the amount is actually

(1) 19 Ves. 345. (2) Law Rep. 5 Ch. 167.

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ascertained and paid to him the proof ought to be reduced, and if he has received the dividends the dividends ought to be paid back according to the order made in *Ex parte Waring* (1). That is substantially what has been done here, and the application of the *Joint Stock Discount Company* must be refused.

Solicitors: Mr. *H. W. Trinder*; Messrs. *Freshfields & Williams*.

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NEWTON *v.* TAYLOR.

[1874 N. 16.]

Practice—Partnership Suit—Reference to Arbitration—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 11—*Costs.*

Post 603, 11 L.T. 945.

The Plaintiff instituted a suit to take the accounts of a partnership between himself and the Defendant, the terms of the partnership being that the Plaintiff was to receive one-twelfth of the profits and to bear one-twelfth of the losses, and that the Defendant was to receive and bear the remaining eleven-twelfths. The partnership articles contained an arbitration clause; and an order was made in the suit, under sect. 11 of the *Common Law Procedure Act*, 1854, that the matters in difference between the parties be referred to arbitration and the proceedings in the suit stayed, the costs being reserved. Under this order an award was made finding a considerable sum due to the Plaintiff:—

Held, that the costs of both parties of the suit, reference, and award, ought to be taxed and paid as to one-twelfth thereof by the Plaintiff and as to eleven-twelfths by the Defendant.

THIS was a suit instituted to take the accounts of a partnership between the Plaintiff and Defendant, upon the terms that the Plaintiff should be entitled to one-twelfth of the profits and bear one-twelfth of the losses, and that the Defendant should be entitled to and should bear the remaining eleven-twelfths.

The partnership articles contained the ordinary arbitration clause; and on the 23rd of April, 1874, an order was made in the suit pursuant to the *Common Law Procedure Act*, 1854, s. 11, that the matters in difference be referred to arbitration, and that in the meantime all further proceedings in the cause be stayed, the costs of the cause being reserved. On the 30th of October an award

(1) 19 Ves. 345.

was made in pursuance of this order, whereby it was found that a sum of £2110 10*s.* 6*d.* was due to the Plaintiff.

A motion was now made on behalf of the Plaintiff that the Defendant might be ordered within seven days to pay to the Plaintiff the amount found due to him by the award, together with interest from the 30th of October, and that the costs of the suit and the reference and award might be taxed and paid by the Defendant, and that all further proceedings in the suit might be stayed.

Mr. *Southgate*, Q.C, and Mr. *E. Ford*, for the Plaintiff, submitted that, as the Plaintiff had practically succeeded in the suit, as was shewn by a large sum having been awarded to him, the Defendant ought to pay the costs.

Mr. *Fry*, Q.C., and Mr. *Ingle Joyce*, for the Defendant, contended that as in partnership suits no costs were given up to the hearing, so here each party should bear his own costs.

SIR G. JESSEL, M.R., said if the suit had been prosecuted to the end the costs of taking the accounts would have been paid out of the partnership assets, and would thus have been borne practically as to one-twelfth by the Plaintiff, and as to the rest by the Defendant; and the fair order, therefore, appeared to be that the costs of both parties, including those of the reference and award, should be taxed and paid as to one-twelfth by the Plaintiff and as to eleven-twelfths by the Defendant.

Solicitors: Messrs. *Underwood & Colman;* Messrs. *Gregory, Rowcliffes, & Rawle.*

V.-C. M.
1874
Nov. 3.

BUSK *v.* ALDAM.

[1874 B. 329.]

Appointment—Special Power—Intervention of Trustees.

Where a person having a special power of appointment over a fund of personalty appoints to trustees for the objects of the power, the Court, though recognising the validity of such an appointment, will not, as a matter of right, transfer the fund to the trustees appointed by the donee of the power.

Ferrier v. *Jay* (1) distinguished.

DEMURRER.

Thomas Benson Pease made his will, dated the 12th of November, 1839, and thereby, after appointing the Defendants his executors, bequeathed to them a sum of £5000 upon trust to invest as therein mentioned, and upon further trust during the life of his daughter *Hannah Ford* to pay and apply the annual interest and produce of the £5000, and the stocks, funds, shares, and securities wherein the same might be from time to time invested according to the written directions, or into the hands of his daughter *Hannah Ford* for her separate use without power of anticipation; and from and immediately after the decease of his daughter *Hannah Ford* the £5000, and the stocks, funds, shares, and securities wherein the same might be invested were to remain and be in trust for all and every or such one or more exclusively of the other or others of the children of his daughter *Hannah Ford*, or of all and every or such one or more exclusively of the other or others of any issue (born in the lifetime of his daughter *Hannah Ford*) of any such child or children for the time being deceased, with such provisions for their respective maintenance, education, and advancement, and at such time or respective times (not happening after twenty-one years to be computed from the decease of his daughter *Hannah Ford*), and if more, then in such shares and charged with such annual sums of money and limitations over for the benefit of the said children or issue, or some or one of them, and upon such conditions, with such restrictions, and

(1) Law Rep. 10 Eq. 550.

in such manner as his daughter *Hannah Ford* by deed, or by her last will in writing or any codicil or codicils thereto to be by her signed in the presence of and attested by two or more credible witnesses, should from time to time direct or appoint. And the testator, after making dispositions for the event of there being no appointment, provided that until the sum of £5000, and the said stocks, funds, shares, and securities should vest absolutely in some person or persons under the trusts thereinbefore declared concerning the same, the trustees or trustee for the time being should receive the annual produce thereof, or such part or parts thereof as should be unapplied under the trusts and provisoes thereinbefore declared and contained, and should invest the same as therein mentioned, so that the same and all the resulting income thereof might, during such suspense of vesting as therein mentioned, accumulate in the way of compound interest, and should from time to time vary the investments of such annual produce and accumulations at their or his discretion. The testator also gave to the Defendants, their executors, administrators, or assigns the sum of £10,000, to be paid or set apart upon trust for the benefit of his daughter *Susannah Pease* and her issue, from and immediately after his death, and to bear interest at the rate therein mentioned from such death; and he willed and directed that the said trustees, and the survivors or survivor of them, and their or his executors, administrators, or assigns (as the case might be), should stand and be possessed of the said sum of £10,000 upon and for the like trusts, intents, and purposes, and with, under, and subject to the like powers, provisoes, limitations, and declarations in all respects in favour and for the benefit of his daughter *Susannah Pease*, and of the issue of his said daughter, with the like limitations over to her, her executors, administrators, appointees, and assigns, or next of kin in case of the failure, or her issue, as were thereinbefore declared, limited, and contained of and concerning the sum of £5000 bequeathed as thereinbefore mentioned in favour or for the benefit of *Hannah Ford* and her issue.

The testator died on the 24th of May, 1840. *Susannah Pease*, on the 4th of November, 1851, married *Edward Thomas Busk*. A settlement was executed on the marriage which did not affect

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the £10,000 given by the will. Mrs. *Busk*, by her will, dated the 19th of March, 1868, made some pecuniary and specific bequests, and then, in exercise of the power in that behalf given to her by the will of her father, *Thomas Benson Pease*, appointed that £7000, part of the £10,000 by the testator's will bequeathed upon trust for the benefit of herself and her issue, or of or out of the investments thereof, should be held upon certain trusts for the benefit of her daughter *Edith Busk*, with limitations over in favour of her other children, and she appointed that the residue of the £10,000 should be held upon certain trusts in favour of others of her children. And the testatrix thereby appointed and declared that the said sum of £7000, and any other property for the time being subject to the trusts thereinbefore declared in favour of her daughter, and also the share or property to which any minor should, or if of full age would, be entitled under or by virtue of her will, should be paid and transferred to her trustees or trustee, and that her trustees should either permit such part thereof as should consist of any investment, or any part thereof, to remain in its actual state of investment, or should sell and invest in the manner therein mentioned, which gave a greater range of investments than had been allowed by the will of *Thomas Benson Pease*.

The testatrix died on the 30th of January, 1873; and it was stated at the bar, though the fact did not appear by the bill, that she left children who were still infants.

The bill was filed by the trustees of Mrs. *Busk's* will against the trustees of *Thomas Benson Pease's* will, and prayed that the Defendants might be ordered to pay the £10,000 to the Plaintiffs as trustees of Mrs. *Busk's* will.

The Defendants demurred, for the purpose of raising in the most expeditious mode the question of the right to have the fund transferred to the trustees appointed by Mrs. *Busk*.

Mr. *Davey*, in support of the demurrer:—

The question is, whether the Plaintiffs can give a legal discharge to the Defendants for the fund. If they can satisfy the Court that they are authorized to do so, the Defendants will not raise any objection to handing over the fund to them.

Mr. *Cookson*, in support of the bill:—

The result of the authorities is, that a person having power to appoint may interpose trustees between the persons having charge of the fund and the objects of the power, and the trustees so appointed will be the persons to apply the appointed fund. *Cowx* v. *Foster* (1) is a case in which a fund was directed to be handed over to a second set of trustees. The series of authorities begins with *Kenworthy* v. *Bate* (2), in which an appointment of real estate was held valid notwithstanding the intervention of trustees. In *Thornton* v. *Bright* (3) an appointment was sustained as being legally valid notwithstanding the intervention of a term of 500 years vested in trustees; and in *Trollope* v. *Linton* (4) the same principle was supported. *Cowx* v. *Foster* was the case of a bill by trustees so interposed for specific performance of a contract for sale entered into by them as such trustees, and a title under them was forced upon the purchaser. *Fowler* v. *Cohn* (5) followed the same rule.

[The VICE-CHANCELLOR:—Do you contend that a mere appointment of the fund to trustees for the objects of the power would be a valid appointment so as to change the trustees?]

It is not a question whether the appointee has the power to change the trustees, but whether the Court will give effect to an interposition of trustees. On this principle, in *Ferrier* v. *Jay* (6), in this branch of the Court, a fund was directed to be transferred to the second set of trustees. In this case there is a manifest convenience in having only one set of trustees to be dealt with.

SIR R. MALINS, V.C., after stating the facts, continued:—

So far as the appointment by Mrs. *Busk* to trustees is concerned, it has been held by a long series of decisions that it is a valid exercise of the power of appointment, and that the appointment is just as good as if it had been made direct to the objects of the power. But this bill is filed for the purpose of having the fund transferred from the trustees in whose control it is now placed to

(1) 1 J. & H. 30. 6 Jur. N.S. 1057
(2) 6 Ves. 793.
(3) 2 My. & Cr. 230.
(4) 1 S. & S. 477.
(5) 21 Beav. 360. 2 Jur. N.S. 315
(6) Law Rep. 10 Eq. 550.

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those to whom it is appointed. For what object this is desired I cannot understand. It is said that it would be very convenient to have the fund placed in the hands of the new trustees. But I cannot look at that. I must consider what was intended to be done by the original testator; and I can see that such a transfer as is asked would violate his intention. I asked Mr. *Cookson* whether he contended that a mere appointment of new trustees by the donee of the power would have been valid, and he pressed upon me that, on the authority of the cases cited, the Court was bound to hand over the fund to the new trustees.

Now there is, first of all, the case of *Thornton* v. *Bright* (1), which simply decides that an appointment to a person not an object of a power as trustee for a person who is an object is a valid exercise of the power; and there are also *Kenworthy* v. *Bate* (2), *Trollope* v. *Linton* (3), *Cowx* v. *Foster* (4), and *Fowler* v. *Cohn* (5). But those were all cases where there was real estate to be converted and no person appointed to effect the conversion, and it was decided that in that case an appointment to trustees to sell and convert and distribute the proceeds amongst the objects of the power was a valid execution of the power. But I am unable to see how that can be an authority for taking away a fund from trustees who are fit and proper, and handing it over to others who may not be so fit, in a case where the duty of the trustees is simply to hold the fund.

I am asked to treat these cases as establishing a general law, that where, in all cases, a fund is settled upon trust for a mother for life, and then upon trust for her children as she should appoint, and she appoints to trustees for her children, the first trustees are bound to hand over the fund to the trustees appointed by the daughter. Here nothing more is required than that some one should hold the fund, and it is suggested that I am bound to hand it over to the second trustees.

Mr. *Cookson* says that I decided the point in *Ferrier* v. *Jay* (6). But what I there decided was, that where there was a general and a special power, and an appointment was made of both funds

(1) 2 My. & Cr. 230.
(2) 6 Ves. 793.
(3) 1 S. & S. 477.
(4) 1 J. & H. 30.
(5) 21 Beav. 360.
(6) Law Rep. 10 Eq. 550.

together to trustees in trust to pay debts and to apply the residue for the objects of the special power, the appointment must be read *reddendo singula singulis*, and the fund coming under the general power applied in the first instance to the purposes to which the fund subject to the special power was not applicable. I agreed with the decision in *Cowx* v. *Foster* (1), that the circumstance of directing debts to be paid only meant that they were to be paid out of the particular portion of the mixed fund which could be so applied.

I did also in that case undoubtedly say that the second trustees were the most fit persons to have charge of the fund; but I did not say that where it was a mere question which of two sets of trustees should hold a particular fund, the Court would necessarily hand it over to the second set in point of date.

The demurrer will be allowed.

Solicitors: Messrs. *Paterson, Snow, & Burney;* Messrs. *Bolton, Robbins, & Busk.*

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[1870 S. 81.]

Executor—Insolvent Estate—Right of Retainer—Exercise for Benefit of Trust Estate.

The administrator of a sole trustee who has died insolvent is entitled, in respect of the trusteeship which has devolved upon him as such administrator, to exercise the legal right of retainer in respect of any debt due to the trust estate, and is bound to do so if required by the *cestuis que trust.*

SARAH SANDER, by her will, dated the 12th of December, 1860, bequeathed to her son *George Bowden Sander* £6000, upon trust to invest the same at interest upon Government or real securities in *England* or *Wales*, or in the Parliamentary or public stocks or funds of *Great Britain* (with power to alter, vary, or transpose the same stocks, funds, or securities for or into other stocks, funds, and securities of a like nature, and also with power of using any portion of the trust moneys not exceeding in the

(1) 1 J. & H. 30.

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whole the sum of £3000 sterling, as thereinafter contained), and directed that he should stand possessed of the trust funds upon trusts which were in effect as to one half for one of the Plaintiffs for life, subject to restrictions in certain events, and after her death upon trusts for her children, with limitations over in favour of all the grandchildren of the testatrix, and as to the other half in favour of the Defendant, Mrs. *Heathfield*, then *Mary Sander*, for life, for her separate use, subject to restrictions in certain events; and after her death upon trusts for the children of Mrs. *Heathfield*, with limitations over in favour of all the grandchildren of the testatrix. And the testatrix empowered *George Bowden Sander* to employ any part of the trust funds not exceeding £3000 in the management or carrying on of any trade or business in which he should be engaged, upon paying or accounting for interest upon so much of the trust moneys as he should so use after the rate of £5 per cent. per annum, and also signing and giving to the person or persons for the time being entitled to the immediate beneficial interest in the money so used or employed under the trusts thereinbefore declared an acknowledgment or declaration in writing stating the amount so used or employed by him, and declaring that, subject to his use and employment thereof, he held and would hold the same upon and for the trusts, intents, and purposes thereby declared. *George Bowden Sander* was also residuary legatee.

The testatrix died on the 22nd of April, 1864, and *George Bowden Sander* proved her will as her sole executor. He possessed himself of her estate, which, after discharging all claims, was more than sufficient to pay the £6000 legacy; and it appeared that he had in the first instance appropriated £3000 to answer one half of the legacy, and had retained the other half in a business he then carried on, in accordance with the provisions of the will; and he continued to pay to the beneficiaries interest on the £6000 till his death on the 12th of January, 1870.

It was then discovered that he had misapplied the whole £6000. By his will he had appointed a sole executor, who renounced probate, and administration with the will annexed was granted to Mrs. *Heathfield*.

It appeared by the Chief Clerk's certificate, dated the 20th of March, 1874, that *G. B. Sander's* estate had been realised and the

proceeds paid into Court, and that his creditors, including the persons beneficially interested in the legacy, had received a dividend of 6*s.* 8*d.* on the amount of their debts, and that there was in Court a further sum available for distribution, which, however, was insufficient for payment of all the creditors in full.

The suit was heard on further consideration on the 8th of June, 1874, and an order made. On proceeding to draw it up a question was raised as to the extent of Mrs. *Heathfield's* right of retainer as administratrix. By the order on further consideration her right of retainer was admitted as regarded so much of the fund in Court as represented her life interest in the moiety of the £6000; but the Plaintiffs sought to extend this right to the entire fund, on the ground that, as administratrix, the trust estate formerly vested in *G. B. Sander* had devolved upon her, and she was bound to exercise the right on behalf of the beneficiaries.

The suit was accordingly set down again for the purpose of arguing this point.

Mr. *Bristowe*, Q.C., and Mr. *J. T. Humphry*, for the Plaintiffs:—

The right of retainer by an executor or administrator to satisfy his own debt depends upon the principle that a man cannot sue himself. Though this is a purely legal doctrine, it is followed in this Court; and where the right arises in respect of a debt as to which the legal personal representative is in a fiduciary position, he is bound to exercise it, if required to do so by the beneficiaries: *Fox* v. *Garrett* (1).

Mr. *Glasse*, Q.C., and Mr. *Procter*, for Mrs. *Heathfield*:—

The principle that a person uniting the two characters of administrator and trustee may retain a sum of money coming into his hands as administrator against a debt due to him as trustee, and give the fact of the retainer in evidence under a plea of *plene administravit*, was laid down by Lord *Denman*, in his judgment in *Farley* v. *Briant* (2), in commenting on the case of *Plumer* v. *Marchant* (3). In *Croft* v. *Pyke* (4) the principle seems to have

(1) 28 Beav. 16. 6 Jur. N.S. 208
(2) 3 A. & E. 858.
(3) 3 Burr. 1380 (cited 3 A. & E. 858).
(4) 3 P. Wms. 180, 183.

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been treated as settled law. The same rule will be followed in equity: *Ferguson* v. *Gibson* (1).

The principle is, that where the hand to receive and the hand to pay is the same the right of retainer exists.

Mr. *Cotton*, Q.C., and Mr. *Cracknall*, for the general creditors of *George Bowden Sander*:—

The point which arises in this case has never yet been decided. The right of retainer is not favoured in equity: *Williams* on Executors (2); and this Court will not extend it to cases to which it has not previously been applied. *Plumer* v. *Marchant* (3) and *Fox* v. *Garrett* (4) were both cases where a person, being already a trustee, afterwards acquired the position which gave him the right of retainer, but no case has gone the length of deciding that where a trusteeship devolves upon any one by reason of his becoming clothed with the authority of executor or administrator, or as one of the incidents of his office, he may make use of that accident for the purpose of giving a benefit to the trust estate to the injury of the general creditors. The right of retainer is a purely legal one, and though this Court will not take it away where it already exists, it will not extend it. It is a right analogous to that of preferring one creditor to another.

Mr. *Bristowe*, in reply:—

The right of retainer, like that of preference, is a privilege accorded executors at law and recognised in this Court. *Ferguson* v. *Gibson* shews that this right extends to trust estates as well as to debts in which the executor is beneficially interested, and the principle cannot be affected by the origin of the trust.

SIR R. MALINS, V.C.:—

The facts out of which this question arises are these:

Sarah Sander gave a sum of £6000 to *George Bowden Sander*, upon trust to invest and to pay the income of one-half to Mrs. *Heathfield* for life, and to distribute the *corpus* on her death, and

(1) Law Rep. 14 Eq. 379.
(2) 7th Ed. vol. ii. p. 1041.
(3) 3 Bur. 1380 (cited 3 A. & E. 858).
(4) 28 Beav. 16.

to pay the other moiety to a sister of Mrs. *Heathfield* for life, and to distribute the *corpus* on her death; and directed that, under certain circumstances, *George Bowden Sander* might retain one-half the fund in any business he might be carrying on. He was, therefore, a trustee of the whole fund for the beneficiaries, and, subject to the power to employ a portion of the fund in his business, it was his duty to invest the whole. He, however, misapplied the fund, and died insolvent. Then his sister, Mrs. *Heathfield*, became his administratrix, and as he had been the sole trustee of the fund, the trust which would have devolved upon his executor if he had proved the will became vested in his administratrix.

Now, if he had died leaving a solvent estate, Mrs. *Heathfield* would have paid every creditor and retained £6000 to answer the legacy. Hers was the hand to receive the money, and, notwithstanding the argument of Mr. *Cotton* and Mr. *Cracknall*, I think she was also the person to pay the money. I think that their argument mixes up legal and equitable considerations. The doctrine of retainer is a purely legal one, but it is followed in this Court, though its existence is always regretted because it produces inequality. It is explained by saying that because the executor cannot sue himself he has the right of retainer.

This doctrine cannot be better expressed than in the way it seems to have been put in argument in *Fox* v. *Garrett* (1), that the right of retainer was a legal right, which the administrator was bound to exercise for the benefit of the parties beneficially interested in the estate to which that legal right was attached. Now, I have put the case of a solvent estate, and have shewn that in that case it would have been the right of the beneficiaries to have a fund retained to answer the legacy. But that right must equally exist in the case of an insolvent estate. The administratrix might have distributed the estate without retaining sufficient to answer the legacy; but since she has retained it, the Court will not, against the wishes of the persons beneficially interested in the estate, interfere with the exercise of the legal right. It turns out that the whole of the estate will be taken up in paying the legacy, and the other creditors will receive nothing. But that is what happens in many other cases, and in the present case the general

(1) 28 Beav. 16. 6 Jur. N.S. 208

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creditors have received a considerable dividend. And seeing that Mrs. *Heathfield* was at once the legal personal representative of *George Bowden Sander* and trustee of the £6000 legacy fund, and had in the latter character become in law absolutely entitled to the fund, the parties beneficially entitled to the money have a right in this Court to insist on having the right of retainer belonging to her in the character of trustee exercised for their benefit.

This is really nothing but the case of *Plumer* v. *Marchant* (1), the result of which, as stated in *Williams* on Executors (2), is that an executor or administrator may retain not only for debts which he claims beneficially, but also for those to which he is entitled as trustee. Therefore, on those grounds, I have no hesitation in saying that Mrs. *Heathfield* has a right of retainer for what is due, not only to herself personally, but to all the persons beneficially interested in the legacy. She represented all the other beneficiaries, and her duty towards them was to repay the legacy out of the estate of *George Bowden Sander*, and she may exercise the right of retainer for the purpose.

Solicitors: Mr. *H. Cowlard*; Mr. *Heathfield*; Mr. *Henry White*.

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PAYNE *v.* WEBB.

[1873 P. 101.]

Will—Construction—Gift to Children and Grandchildren—Per Capita and not per Stirpes.

A testator gave the residue of his real and personal estate unto his two sons and three daughters by name, and to the children born of the body of his daughter *E.*, deceased, and the children born of the body of his daughter *L.*, deceased, to be divided among them in equal shares and proportions. One of the deceased daughters had five children, and the other had two children:—

Held, that the residue must be divided in twelfths between the five surviving children of the testator and the seven children, *per capita*, of the two deceased daughters.

THIS was a suit for the administration of the will of *John Milsom*, dated the 13th of April, 1872, by which the testator gave

(1) 3 Burr. 1380 (cited 3 A. & E. 858). (2) 7th Ed. vol. ii. p. 1041.

all his real and personal estate to trustees to sell and convert the same into money, and after payment thereout of the just debts, funeral and testamentary expenses, he gave and bequeathed unto each of the children of his daughters, *Lydia Watts*, *Matilda Overton*, *Ellen Payne*, and *Eliza Hulbert*, who should attain the age of twenty-one, the sum of £100. He gave unto his sons, *Thomas Milsom* and *John Milsom*, the sum of £300 each; and he gave, devised, and bequeathed all the rest, residue, and remainder of his said real and personal estate and effects in these words: "Unto my said sons and daughters, the said *Thomas Milsom*, *John Milsom*, *Lydia Watts*, *Matilda Overton*, *Ellen Payne*, and to the children born of the body of *Eliza Hulbert*, deceased, and the children born of the body of *Lucy Hampton*, deceased, to be divided amongst them in equal shares and proportions." And the testator directed his trustees and executors to invest the amount of the shares and proportions belonging to the said children of *Eliza Hulbert* and of the said *Lucy Hampton* in the public funds, and to be paid to each of them when they should attain the age of twenty-one years; and he directed that the shares belonging to the said *Matilda Overton* and to the said *Ellen Payne* should be paid to them for their sole use and benefit absolutely.

The testator died in May, 1872, leaving his two sons, *Thomas* and *John Milsom*, and his three daughters, *Lydia Watts*, *Matilda Overton*, and *Ellen Payne*, him surviving. There were issue of *Eliza Hulbert* (deceased), five children, of whom the eldest only had attained twenty-one; and of *Lucy Hampton* (deceased), two children, both infants.

The question now raised was whether the residuary estate of the testator was to be divided in sevenths between the five children who survived him and the children of the two who were dead, such children taking, *per stirpes*, the share which their parents, if living, would have taken; or whether the said residuary estate was to be divided into twelfths between the five children who survived and the seven children, *per capita*, of the two who had died.

Mr. *Glasse*, Q.C., and Mr. *Cookson*, for the five children of the testator who were alive at his decease:—

There can be no doubt in this case what the intention of the

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testator was. In such a case as this it has been held that the Court will lay hold of the faintest indication of the testator's intention in order to carry out the manifest object he had in view, which must have been to give to the children of his deceased children that share to which their parents would have been entitled. This principle is stated in *Jarman* on Wills (1). We find here that there is, in the first place, a gift of the residue unto his two sons and three daughters, followed by the words "and to" the children born of the body of *Eliza Hulbert*, deceased, and the children born of the body of *Lucy Hampton*. This latter portion of the gift is separated from the former portion by the words "and to," clearly shewing that he did not mean to rank the grandchildren equally with the five surviving children. It is, therefore, a gift to the five surviving children of one-seventh each, and to the children of the deceased daughters of two-sevenths.

Blackler v. *Webb* (2), *Amson* v. *Harris* (3), and *Tyndale* v. *Atkinson* (4), are distinguishable. Our view of the case is supported by the previous gifts in the will, where the testator gave to each of the children of his daughters, *Lydia Watts*, *Matilda Overton*, *Ellen Payne*, and *Eliza Hulbert*, who should attain twenty-one, the sum of £100. There he expressed his intention clearly of a separate bequest to each, and if he had intended to give a separate share to each of the children of his deceased daughters, he would, no doubt, have used a similar expression to that which he used in the former part of his will. By the omission of those words he must have intended the children of his deceased daughters to take collective shares *per stirpes*.

Mr. *Bristowe*, Q.C., and Mr. *Royle*, for the children of the deceased daughters, were not called upon.

Mr. *J. Pearson*, Q.C., and Mr. *Millar*, for the executors.

SIR R. MALINS, V.C.:—

If I were at liberty to conjecture what the testator intended to do, I should have no doubt that he meant to divide his residuary

(1) Vol. ii. p. 181.
(2) 2 P. Wms. 384.
(3) 19 Beav. 210.
(4) 23 Ibid. 74.

property into seven shares, giving one share to each of his surviving children, and one share *per stirpes* to the children of his deceased daughters; and if I had had to prepare his will I should have simply added the usual words shewing that such children were to take the share to which their parents would, if living, have been entitled; but in order to construe a will I must find words to effect that intention, and I can see no words here to throw the children into one class. It is a gift "to my sons and daughters"—naming the five surviving children—"and to the children born of the body of *Eliza Hulbert*, deceased, and to the children born of the body of *Lucy Hampton*, deceased, to be divided amongst them in equal shares and proportions." I have not been furnished with any authority deciding contrary to the strict words of the will. It has been argued that a faint indication of intention will be sufficient to direct a division *per stirpes*, and the word "to" is referred to by way of affording such indication, and the case of *Blackler* v. *Webb* was cited in support of the contention. There the testator gave the residue to his son *A.*, and to *B.'s* children, and to his daughter *C.* and *D.'s* children, and to his daughter *E.*; and this was held to be a gift to the children of *B.* and the children of *D. per capita*, as if all had been named. It is stated that Lord Chancellor *King* was inclined at first to put a construction on the will which would give the property to the children *per stirpes;* so am I inclined to do that, but I am sorry I cannot carry out what I believe to have been the intention of the testator; but Lord *King* at length decided that the division must be *per capita*, and I also am bound to construe the words according to their literal meaning.

No case has been cited in which the construction now contended for has ever been put upon such words, and I should be going beyond any of the authorities if I acceded to the contention urged on behalf of the five surviving children. I regret, therefore, that I am bound to come to the conclusion that the five children and the seven grandchildren take, *per capita*, one twelfth share each.

Solicitor for the Plaintiff: Mr. *J. L. Mathews.*

Solicitors for the Defendants: Messrs. *Wood, Street, & Hayter.*

V.-C. M.
1874
Nov. 3.

MYTTON *v.* MYTTON.

[1874 M. 162.]

Will—Construction—Legacy, Specific or Demonstrative.

A testatrix having £3000 *East India* Debenture Bonds gave a legacy by the following description:—"The sum of £3000 invested in Indian security":—

Held, not a specific legacy, and not liable to ademption.

DEMURRER.

This bill stated the following facts:—

Charlotte Henrietta Avarina Mytton, spinster, by her will, dated the 5th of May, 1870, provided as follows:

"I give and bequeath to my friend, the Honourable *Robert Charles Herbert*, of *Ocleton*, his executors and administrators, all my money which shall be out at interest, invested in the funds, or otherwise secured at my decease, upon trust, in the first place, to pay thereout all my just debts, and funeral expenses, and testamentary expenses, and, in the next place, to pay to my nephew, *Henry Whitehead Mytton*, the sum of three thousand pounds invested in Indian security, my said nephew, *Henry Whitehead Mytton*, to enjoy the interest of the same during his lifetime, and at his death two thousand pounds to go to his eldest son, *Henry Robert Herbert Mytton*, and one thousand pounds to his daughter, *Frances Harriott Mytton*, or, in case of their death before the age of twenty-one, the said sum of two or three thousand pounds to be equally divided between the surviving children."

The testatrix died on the 13th of February, 1874. At the date of her will she was possessed of 5 per Cent. Debenture Bonds of the *East India* Loan to the nominal value of £3000, which she had acquired in the year 1866 in exchange for £3000 *East India* Loan Scrip, she having purchased such scrip on the 10th of May, 1859, for £2237 6*s.* 2*d.* The debenture bonds were paid off or redeemed by the Government of *India* on the 6th of September, 1873, and the testatrix invested the proceeds in other ways, and at her death she had no moneys invested on Indian securities of any description.

The Plaintiffs were the persons beneficially interested in the legacy, and the Defendant was the acting executor, and the bill, after stating the above facts, prayed for a declaration that the legacy was not adeemed, but was payable out of the money which the testatrix had out at interest, invested in the funds, or otherwise secured at her death, and that the Plaintiffs were entitled to have the same set apart and secured for their benefit. In order to raise the question in the most expeditious way the executor demurred.

Mr. *Davey*, for the demurrer:—

The question is, whether this is a specific or general legacy. If the former, it has been adeemed. The words "invested in Indian security" are part of the description of the subject of the gift, and the words are sufficient to designate a particular fund which the testatrix then had and wished to give. Where the words of a gift do not point to a particular fund belonging to the testator at the date of the will the legacy is general: *Robinson* v. *Addison* (1); but where there is a distinct reference to such a fund it is specific. This was the basis of the decision in *Millard* v. *Bailey* (2), and the point was expressly decided in *Gillaume* v. *Adderley* (3), where the words were very similar to those in the present case.

Mr. *Glasse*, Q.C., and Mr. *Renshaw*, for the Plaintiffs:—

The entire will must be taken together in order to arrive at the intention of the testatrix. There is, first of all, a specific gift to the executors, and the whole of the fund so given is, in the first instance, charged with debts. Then follows the gift in question. But the words by which it is described do not amount to a specific reference to the stock actually in the possession of the testatrix when she made her will, and are, therefore, not strong enough to lead necessarily to the conclusion that the gift is specific: *Robinson* v. *Addison*. Unless it is necessary to conclude from the words of the will that the testatrix alluded to a particular fund, the Court cannot hold the gift to be specific: *Gillaume* v.

(1) 2 Beav. 515. (2) Law Rep. 1 Eq. 378.
(3) 15 Ves. 384.

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Adderley (1). The true criterion as to whether a legacy is specific, is whether it is liable to ademption: *Parrott* v. *Worsfold* (2); *Williams* on Executors (3); and that test fails in the present case, because the testatrix speaks of stocks belonging to her at her death, and which, therefore, could not have been adeemed: *In re Gibson* (4). Even the use of the word "my" is not necessarily sufficient to make a legacy specific: *Parrott* v. *Worsfold.*

Mr. *Davey*, in reply:—

There was in *Gillaume* v. *Adderley* a gift, which was held to be specific, expressed in terms almost identical with those of the present case.

SIR R. MALINS, V.C.:—

The construction of this will is by no means free from difficulty. But I certainly see very plainly that, if this gift were held to be specific, the intention of the testatrix, which was that the nephew, at all events, should have the legacy, would be entirely disappointed. It is, however, clear that if the will is expressed in such form as leads me to hold that the gift is specific, I must so determine. But the authorities which were cited, and others which might have been referred to, shew that in order to determine this question the Court will look to the whole of the will for the purpose of ascertaining the intention of the testatrix in making this provision.

What was the intention of this testatrix? She begins with a specific legacy of certain parts of her estate to her trustees. It is certainly specific to some extent, though not so much so as Mr. *Glasse* and Mr. *Renshaw* contended. I think it would have passed any balances at her bankers. She then charges her debts upon this fund, then makes the gift in question. [His Honour then read the clause set out above, and continued:—]

Now, did she intend merely to give shares in Indian funds? If she had used the word "my" the gift must have been held specific, and have failed, because she had no property answering that description at the time of her death. If she intended to give a

(1) 15 Ves. 384.
(2) 1 Jac. & W. 594.
(3) 7th Ed. p. 1164.
(4) Law Rep. 2 Eq. 669.

legacy, at all events, the words descriptive of the fund make it simply a demonstrative legacy.

In this case I am so clearly satisfied that it was the intention of the testatrix to give £3000, irrespective of the kind of investment she might have at her death, that I would look carefully at everything in the will tending to shew that it was not specific. If she had said, "I give £3000 which is now invested in Indian securities," the gift would be simply demonstrative. Now, looking at the whole will, I am so clearly of opinion that it was her meaning to give the £3000 which was then invested in Indian securities, that I think it ought not to fail, because at her death there was no fund invested in Indian securities, and I am perfectly satisfied that this decision will be in accordance with her real intention.

The demurrer will, therefore, be overruled.

Solicitors: Messrs. *Renshaw & Rolph;* Messrs. *Paterson, Snow, & Burney.*

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[1874 C. 113.]

Production of Documents—Foreign Government Loan—Mortgage—Scrip and Bonds.

A foreign government employed *K. & F.*, as agents in *London*, to bring out a loan on the English market, and to issue scrip certificates to the subscribers, and to exchange such scrip for bonds upon the amount subscribed being fully paid. The government employed *E. & Co.* as their agents and bankers, with power to receive from *K. & F.* the sums subscribed. Subsequently bonds in the hands of *K. & F.* were pledged by the President of the government to *E. & Co.*, but the validity of this security was disputed by the government. The government filed a bill against *K. & F.*, *E. & Co.*, and others, for accounts of the dealings connected with the issue of the loan.

Upon motion that a member of the firm of *K. & F.*, upon cross-examination in the cause, should produce certain documents to the production of which *E. & Co.* objected:—

Held, that the scrip certificates and the scrip book in which the certificates were entered must be produced, but not the bonds themselves, since

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the foreign government might, by knowing the numbers of the bonds, use their information to the prejudice of *E. & Co.*, their mortgagees, and the knowledge of the numbers of the bonds was not shewn to be relevant to the suit.

THIS was a motion on behalf of the Plaintiffs in the suit that the Defendant *William Knowles*, a member of the firm of *Knowles & Foster*, might be ordered to produce before the special examiner appointed to take the examination of the witness, all the provisional scrip certificates of the *Costa Rica* Loan of 1872, a book called "The *Costa Rica* Scrip Book," and also certain bonds of the Republic of *Costa Rica* to the nominal value of £442,200 and £173,500, and that the Plaintiffs might be at liberty to inspect such particulars when produced.

The bill was filed by the Republic of *Costa Rica* against Messrs. *Erlanger & Co.*, financial agents, Messrs. *Cohen & Sons*, stock-jobbers, and Messrs. *Knowles & Foster*, merchants.

It stated that in the year 1872 the Plaintiffs were desirous of raising in this country a public loan upon the issue of bonds of the nominal amount of £2,400,000, and applied to *Erlanger & Co.* to act as agents for the Republic in bringing out the loan: that *Erlanger & Co.* recommended the government to employ the Defendants *Knowles & Foster* to bring out the loan: that a contract was entered into between the Plaintiffs and *Erlanger & Co.* under which *Erlanger & Co.* were to have power to purchase on the *Stock Exchange* on account of the Republic such an amount of the loan of 1872 as they should think necessary to assure the good result of the operations: that *Erlanger & Co.* were also to receive from *Knowles & Foster* the amounts proceeding from the subscriptions.

The bill also stated a contract by the government with *Knowles & Foster* for the issue of the loan by the latter firm, the proceeds less commission and authorized deductions to be paid to *Erlanger & Co.*, who were to give discharges on behalf of the government.

The bill also stated that the whole of the loan of £2,400,000 was subscribed for by the public, with the exception of £173,500, and the moneys actually paid at the issue price of 82 per cent. amounted to £1,825,730: that scrip certificates were issued by *Knowles & Foster* to the subscribers, and these, upon the money being fully paid, were exchanged for bonds: that bonds to a

large amount, partly unissued and partly deposited after issue by *Erlanger & Co.*, were in the hands of *Knowles & Foster*.

The bill also stated that General *Guardia*, the President of the Republic of *Costa Rica*, arrived in *England*, and *Erlanger & Co.*, having entered into correspondence with him, induced him, as the bill alleged, to enter into a contract unknown to the Government of the Republic, to the effect that *Erlanger & Co.* should advance certain sums of money to the Republic on the security of all the bonds of the loan of 1872 which then remained at the disposal of the government, and which were thereby alleged to be specially hypothecated for the repayment of such advances, amounting in the whole to £917,300 and £173,500, and if the government failed to pay the amount due *Erlanger & Co.* were to have the absolute right to sell so many of the said bonds at the market price of the day of sale as would be sufficient to repay them the amount then due in respect of their advances. The bill impeached the validity of this transaction. It appeared that *Cohen & Sons* also claimed an interest as mortgagees, which was disputed by the government. The bill charged improper dealings by *Erlanger & Co.* in the purchase of bonds and in the employment of the moneys of the Republic, and also charged the other Defendants with collusion, and prayed various accounts and inquiries, and an injunction to restrain the Defendants from dealing with or disposing of any of the bonds or scrip certificates in their possession.

On the cross-examination of *William Knowles* upon a motion, he had been called upon to produce the scrip certificates the scrip book, and the bonds, and by his counsel had offered to produce them if the other Defendants would consent. The Defendants *Erlanger & Co.* and *Cohen & Sons* objected, and the matter was referred to the Court.

Mr. *Glasse*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Locock Webb*, appeared in support of the motion.

The VICE-CHANCELLOR desired that the question as to the first two descriptions of documents should be argued first; and having stopped Mr. *Glasse* after he had opened the case, called upon Mr. *Cotton* to argue these two questions.

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Mr. *Cotton*, Q.C., Mr. *Fry*, Q.C., and Mr. *Ingle Joyce*, for Messrs. *Erlanger & Co.*, submitted that the Plaintiffs had no right to inspect the documents in question, since the numbers of the bonds could not be material to the issue, and that a mortgagee could not be compelled to disclose any part of his security except upon payment of his mortgage debt. Under any circumstances, this was not the time to order these documents to be produced, while a witness was being cross-examined.

Mr. *Bristowe*, Q.C., and Mr. *Ferrers*, for *Cohen & Sons*, supported the same contention.

Mr. *J. Pearson*, Q.C., Mr. *Hemming*, and Mr. *Davey*, for *Knowles & Foster*, did not oppose the production, but submitted to act as the Court should direct.

SIR R. MALINS, V.C., after stating the facts of the case, continued:—

The question as to the scrip certificates arises in this way: By the agreement entered into between the Plaintiffs, the Republic, and *Erlanger & Co.* and *Knowles & Foster*, it was provided that *Knowles & Foster* should deliver to the subscribers to the loan scrip certificates upon payment of their first instalments, and that when all the instalments were paid up, then the scrip certificates were to be returned by the subscribers to *Knowles & Foster*, as the agents of the Republic, who were to exchange them for bonds. This was accordingly done, and these scrip certificates, to the amount of £2,226,000, were taken back, and bonds to an equal amount were issued. So the subscribers gave up the scrip when the money was paid, and received their bonds. Then there was a book kept by *Knowles & Foster*, in which all the scrip certificates that were issued were entered, and that was called the scrip book.

Now, what is the position of *Knowles & Foster* with regard to this scrip? They were the agents of the Republic to borrow this money, and they were the agents of the Republic to issue the scrip, to receive the money, and to receive back the scrip when the whole of the money was paid, giving, in exchange for the scrip, bonds of a similar amount. Messrs. *Knowles & Foster*, as agents of

the Republic, have no title to these scrip certificates, nor do they in fact set up any title to them. Who, then, has a title to them? It has been urged that the mortgagees of a certain portion of the bonds have a right to prevent the agents, Messrs. *Knowles & Foster*, from producing the scrip certificates, and that the Republic has no right to see them in the hands of their own agents. But even if *Erlanger & Co.* have a right to a portion of the bonds or the scrip, what right can they have to prevent production of that scrip which never formed part of their security? They have no claim upon the scrip which has been given up by the holders of the bonds to *Knowles & Foster*. My opinion clearly is, that, on the scrip being exchanged for bonds, it became the property of the Republic, and they have a right to take possession of it for themselves, and dispose of it as they may think fit, or, if they please, they may direct Messrs. *Knowles & Foster* to deal with it in any manner they choose. Nothing has occurred to prevent or alter that right, and the claim set up by *Erlanger & Co.* to these scrip certificates is utterly unfounded.

The right to production of the scrip book rests upon the same foundation, and to neither the scrip nor the scrip book can *Erlanger & Co.* or *Cohen & Sons* have any claim, nor can they have any right to prevent the production of either of the documents.

Then as to the form in which this question is brought before the Court. In the course of the cross-examination of Mr. *Knowles* by the Plaintiffs' counsel before the special examiner, the production of these documents was called for, and their non-production impedes the continuance of the examination. It becomes important that the question should be determined whether the documents are to be produced or not, the object being to give the Court that information which it ought to have in order to arrive at a proper decision.

It appears that Mr. *Knowles* considered he ought to produce the documents, but he was prevented from doing so by *Erlanger & Co.* and *Cohen & Sons*. I quite agree with Mr. *Knowles* in thinking that the scrip ought to be produced, and if the scrip should be, then, certainly, the book in which it is entered should also be produced, as it contains the entries of all the scrip allotted to the sub-

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scribers to the fund, copied into the book by the paid agents of the Republic.

I have now decided only the question as to the scrip and the scrip book, but as to the bonds, I must hear further argument.

Mr. *Glasse*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs:—

The object of the Plaintiffs in calling for these bonds is to ascertain the propriety of the transaction which is impeached by the bill. For this purpose we must know the numbers of the bonds which are claimed by *Erlanger & Co.* This is the only means we have of tracing the bonds alleged to have been purchased by them, and which we say were fraudulently and improperly obtained by *Erlanger & Co.* We are in a position to redeem, and we are entitled to know which are the securities claimed. The rule which protects a mortgagee from the production of his title-deeds has no application in the following cases: First, where a deed is impeached for fraud; secondly, where you have a confidential relationship existing—then the rule does not apply; and, thirdly, when it is not required to get the documents out of the hands of the mortgagee, but only to have inspection of them. These bonds are in the hands of the persons selected by us to be the custodians, and we are entitled to inspect them when we allege that they have been misappropriated.

There are authorities for all these propositions. In the case of *Kennedy* v. *Green* (1) it was ordered that a deed in the custody of a purchaser for valuable consideration which the bill impeached for fraud should be produced, and in *Latimer* v. *Neate* (2), where the Plaintiff was seeking to redeem and to have an instrument treated as a mortgage security which the Defendant had set up as an absolute title, and the Defendant had set out what he stated as the contents of the deed, the Plaintiff was declared entitled to inspection, if only to see whether the abstract was or was not a correct abstract of the deed of which he sought production. In *Beckford* v. *Wildman* (3), the object being to set aside deeds, the Court held that upon motion it could not go beyond the usual

(1) 6 Sim. 6.

(2) 11 Bli. 112; S. C. 4 Cl. & F. 570.

(3) 16 Ves. 438.

liberty to inspect and for production at the hearing without a special case; and under the circumstances of the case, having reference chiefly to the variations in the two deeds, the order was limited to production at the hearing. *Balch* v. *Symes* (1) is an authority that production will be ordered where the object is to impeach a deed, and the Defendant could not resist production on the ground of lien.

Allegations of fraud have always been held sufficient to entitle a Plaintiff to production of a document. In *Bassford* v. *Blakesley* (2) an order was made for the production of a deed impeached for fraud, though the fraud was denied by the answer, the case being on the whole such as to render an inspection proper. In *Gibson* v. *Hewett* (3), in a suit for redemption, a mortgagee was ordered to produce bills of exchange and promissory notes admitted to be in his possession; and in *Freeman* v. *Butler* (4), although the mortgagee, who was also executor and trustee, was not compelled to produce the mortgage and title-deeds, he was ordered to produce all accounts relating to the mortgage. In *Crisp* v. *Platel* (5) the Master of the Rolls expressed his opinion that it would be as well if every document relating to the matters in controversy were in all cases ordered to be produced, but he decided that the mere allegation in a bill that a mortgage was bad and was contested would not entitle a mortgagor to production. In *Follett* v. *Jefferyes* (6) the reason why the Court refused production of certain letters was that no fraud was proved, but had there been fraud the production would have been ordered; and it was laid down by your Honour, in *Phillips* v. *Holmer* (7), that where parties were charged with fraud they could not claim privilege for any communication.

The evidence in this case shews a charge of fraud and improper dealing with the documents in question, and under such circumstances we have a right, upon the authorities cited, to have them produced for examination.

(1) T. & R. 87.
(2) 6 Beav. 131.
(3) 9 Ibid. 293.
(4) 33 Beav. 289.
(5) 8 Ibid. 62.
(6) 1 Sim. (N.S.) 1.
(7) 15 W. R. 578.

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Mr. *Cotton*, Q.C., Mr. *Fry*, Q.C., and Mr. *Ingle Joyce*, for *Erlanger & Co.*:—

We are now upon the question of whether a witness is bound for the purpose of this motion to answer a particular question. Much time has been occupied in the arguments in support of the Plaintiffs' right, but no particular reason has yet been shewn for supposing that the numbers of these bonds will assist them either on the motion or on the hearing. On the contrary, we say that the Republic must have some sinister motive in trying to ascertain what are the numbers of the bonds which we hold as distinguished from those held by the general public. It is evident that the non-payment of dividends to the general public would ruin the government throughout *Europe* as regards their credit; but they may think it will not ruin them if they decline to pay dividends upon our bonds, although coming here as mortgagors they could not restrain us from selling them. The Plaintiffs, being a foreign government, cannot be sued; they are beyond the jurisdiction of this Court, and cannot be bound by any undertaking they may give. If they are ready and willing to pay the interest, they ought to pay into Court the £49,000 which we swear is due to us. When that is done, and the Court has control of the money, so that if the suit is decided in our favour we shall have the fruit of our mortgage, then they shall not only have production, but they shall have delivered up every one of these bonds.

[The VICE-CHANCELLOR asked whether the Plaintiffs were willing to bring the money into Court.

Mr. *Glasse* declined to do so, and said there was no precedent for such a course where there was a charge of fraud.]

The point, then, is, whether on this motion the Court can say that this question is material for the issue raised when it is seen that, if these bonds are produced, the Plaintiffs will be able to prejudice us even although the suit should be decided in our favour. They might, if they thought fit to do so, decline to pay dividends on the bonds we hold, and the price would fall at once from 23, at which they now stand, down to nothing; and this

is the motive which they are naturally desirous of concealing. This is not the time for going into the question whether or no the charges made by the bill against *Erlanger & Co.* can be supported. Notwithstanding the charges in the bill impeaching the mortgage, yet no injunction could be granted to restrain the mortgagee from realising his bonds, without bringing the money into Court. We have evidence entirely denying the charges made by the bill; but whatever may be decided at the hearing, the deed under which we claim now stands as a valid deed, and under that we claim to be entitled as mortgagees to the property therein comprised to the extent of £49,000, and until that deed is set aside neither *Erlanger & Co*, nor those who hold the bonds for them, can be considered as holding the bonds *quâ* agents. The rule as regards a mortgagee is this: If the bill impeaches the deed, and alleges there is anything on the face of the deed which will support the charge, then the Court with reluctance orders the deeds to be produced; but here the bonds are not impeached on the footing of their not being binding bonds, if they are well in our hands under a good mortgage. Nor is the mortgage deed impeached with reference to any matters arising on the bonds, but only on the ground that it was not duly authorized and was obtained by misrepresentation. There is no suggestion in the evidence that the particular numbers of the bonds would assist them in making out the case of fraud alleged against the security; consequently *Kennedy* v. *Green* (1), and the other cases referred to, entirely fall to the ground. Unless it is alleged that the document asked to be produced bears on the face of it something which assists the case of the mortgagor impugning the title of the mortgagee, there can be no case for production.

Mr. *Bristowe*, Q.C., and Mr. *Ferrers*, for *Cohen & Sons*, said they had nothing to do with the agency; they were simple mortgagees, and were ignorant of what took place between the parties. They held some of these bonds as purchasers for value without notice.

Mr. *J. Pearson*, Q.C., Mr. *Hemming*, and Mr. *Davey*, for *Knowles & Foster*, submitted to act as the Court should direct.

(1) 6 Sim. 6.

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SIR R. MALINS, V.C.:—

For the present purpose I must, of course, assume that the charges of fraud made out and not proved cannot be proved. I must presume that the Defendants are innocent until the contrary is proved. The motion for production of these bonds has raised points as difficult as I have ever had to deal with, so much so that my mind has fluctuated very much in the course of the argument as to what order I should make: and I have at length come to the conclusion, for the reasons I will state, that I ought not, in the present stage, without the money being deposited, to order them to be produced.

The facts are these: The Republic of *Costa Rica*, in the year 1872, desired to raise money in the English market, and sent Señor *Alvarado*, a gentleman selected by themselves, as an agent for the purpose of raising the money; and Señor *Alvarado* applied to *Erlanger & Co.*, bankers or financial agents—or, as they are sometimes called, loan contractors—in *London*, to undertake the raising of the loan. These gentlemen recommended him to go to a firm of longer standing in *London*, namely, Messrs. *Knowles & Foster*, who were accordingly employed to bring out the loan, which was issued at 82 per cent., and in a very short time the whole of the loan was taken up. Out of £2,400,000 more than £2,200,000 was actually subscribed for, and the deposit paid. Very shortly afterwards—within a month—an operation was entered into by *Erlanger & Co.*, on the propriety of which, in due time, when the case is fully heard, it may be necessary to express an opinion. At present I may say it does not seem to reconcile itself to one's notion of what is right. Part of the arrangement made was that the public should be invited to subscribe to this loan of £2,400,000, while there was a contract between *Erlanger & Co.* and the agent of the Republic, by which they were to repurchase so much of the loan as they should think fit within a limited time. Accordingly, it appears that these gentlemen, being employed as the loan contractors to issue the loan, actually repurchased at times not ascertained £1,400,000, and also a further amount of £26,500, on the 7th of June, the loan having been issued on the 1st of May. That is a transaction which will hereafter require considerable explanation. It does

not, on the face of it, look very favourable in a transaction of this kind. *Erlanger & Co.* did this, but at the same time they communicated to Señor *Alvarado* what they had done.

It is said that was not known to the Republic, and not authorized by them; but if they select a man in whose integrity they can rely, they have no right to repudiate the transaction and throw the whole blame upon him. It is clear that it was done with the full sanction of the agent of the Republic.

These financial operations go on. Part of the produce of the loan is sent out in gold to *Costa Rica* in very large sums. A debtor and creditor account is rendered by *Erlanger & Co.*, and the result of the account is that a considerable sum of money remains due to them. They have pledged their oath that that is a correct account, and for the present purpose I must assume that it is so, and that the sum which they swear to be due to them is in fact due to them. The result of this account being a balance in their favour, a deed was executed by the person who for this purpose I must assume was the authorized agent of the Republic, by which it is agreed that bonds to the amount of £917,300 already issued, and £173,500 of those bonds not issued, should be placed in the hands of Messrs. *Knowles & Foster* for the purpose of securing to *Erlanger & Co.* the balance which was due to them and admitted by the agent of the Republic to be due. The principle of that deed is that *Knowles & Foster* are to hold this very large amount of bonds as a security for the debt, and that there is a right in *Erlanger & Co.*, whenever they think fit, to require the depositories, *Knowles & Foster*, to deliver the bonds to them for the purpose of being sold in the market. A very large amount of these bonds, that is, between £400,000 and £600,000 of the original sum of £917,000, still remains in the hands of *Knowles & Foster*. The £173,000, I suppose, has never been issued at all; but whatever represents that, if it is represented at all, also remains in their hands. Now litigation has arisen between the parties, this bill has been filed and has been pending before me ever since May last. After some delay an arrangement was made for the appointment of a special examiner, and Mr. *Roupell* was appointed shortly before the vacation, and has been engaged during the vacation in taking the evidence which the parties have adduced before him.

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Now, the real question between the parties is, whether the amount claimed by *Erlanger & Co.* is justly due to them. They swore, I think, when the bill was filed, that the balance due to them was £60,000, but the last affidavit states the amount to be £49,000. That sum, I have already said, I must assume to be due, as they swear it is. But the Plaintiffs, the Republic, say it is not due, because there have been such fraudulent transactions on the part of *Erlanger & Co.* in the course of this loan and the raising of this money, that, instead of a balance being due to *Erlanger & Co.*, a large balance is due from them to the Republic. The Plaintiffs have thought fit to cross-examine Mr. *Knowles* on a very long affidavit he has made, and in the course of the cross-examination Mr. *Knowles* was asked to produce the scrip, the scrip book, and the bonds. I have already decided that the scrip he was bound to produce, and so as to the scrip book, and to that I adhere. He was also asked to produce those bonds which remain in his possession as agent. It is said he was the agent of both parties, the agent of the borrower and the lender, the debtor and the creditor. Is he bound to produce those bonds? Now, in favour of his producing them much has been said, and I think with propriety much can be said. The general rule that a mortgagee is not bound to produce his security, except on receiving payment of his principal, interest, and costs, has not been questioned on either side; it is the rule of this Court, and has very long been so, and it is impossible for any Judge, until something further can be shewn, to act against that rule. If it were a mere dry case of mortgagor and mortgagee, it is perfectly clear that the mortgagor cannot require production except on payment; but there are many exceptions to that, and I think it is clear from the authorities that have been cited, that there is an exception where, as Lord *Eldon* expressed it, the object is to destroy the security—that is, where the security is impeached. It was said, in two cases which were cited, that the mere fact of filing a bill charging the mortgagee with fraud will not entitle you to production, because, if that were allowed, any mortgagor who wanted to see the deeds would only have to file a bill alleging fraud and move for production. That would not do; but it is different where the deed is impeached, that is, where, in the view

of the Court, such a case is made as raises a doubt whether the Plaintiff has a right to impeach the deed, then the deed is in that sense impeached. *Beckford* v. *Wildman* (1), cited by the Plaintiffs' counsel, *Balch* v. *Symes* (2), and *Bassford* v. *Blakesley* (3), lay down the rule in a manner that I should be very much inclined to adhere to. In the last case Lord *Langdale* says: "The Court must look to the circumstances of each case, and, looking to the circumstances under which these deeds have been obtained, I think it quite reasonable that the deeds should be produced." Then he goes into the particular circumstances.

Now, that being very much in favour of the production, I think it is also very important on all these matters of production to see that they are not ordered as mere matter of curiosity. They are ordered for the purpose of furthering the administration of justice: to enable the parties to ascertain the truth and submit the truth to the Court, to enable it to adjudicate properly on the case. Therefore a mere motion to produce documents, from motives of curiosity, will not be attended to. It must be shewn that there is some practical utility in the production. On the other hand, I think it must also be considered, when the particular circumstances are gone into, what are the advantages of production? Is the production likely to be injurious to the party ordered to produce? If it is likely to be injurious to the party producing, and not beneficial to the party to whom the production is made, those are very good reasons why the production should not be ordered.

Now what is this case? Assuming everything that the Plaintiffs state in their bill to be true, and that they have a right to set aside these transactions, they will have a right then to an account against *Erlanger & Co.*, not only of what they have yet done, but of what they may hereafter do. Therefore, if they sell these bonds, they will be accountable to the Republic for the produce of the sale. But if they have above £400,000 in their hands still unsold, how are the Plaintiffs to be benefited by knowing the numbers of those which are unsold? I confess, after all I have heard, I have not been able to grasp anything which shews me that any benefit can arise to the Plaintiffs by knowing these

(1) 16 Ves. 438. (2) T. & R. 87. (3) 6 Beav. 131, 133.

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numbers. They know the amount. They know there are between £400,000 and £600,000 of those bonds issued and unissued in the hands of *Knowles & Foster*, and they know, therefore, if the account is taken, that those bonds, or the value of them, as the Court shall decide, must be brought back. But I am unable to see that they would get any benefit from knowing the particular numbers. I cannot see, therefore, the benefit to the Plaintiffs of having them produced.

On the other hand, what may be the mischief to the Defendants by the production? It occurred to me in the course of the argument, before it was suggested by Mr. *Cotton*, that the Plaintiffs might put an advertisement in the public papers warning the public that these numbers have not been duly issued, but have been fraudulently obtained from them, and cautioning the public against dealing with them. That would be destroying Messrs. *Erlanger's* security, and these bonds would be mere waste paper in their hands. After such an advertisement as that, they would have no means of getting their debt. But have I any means of meeting that evil? The Plaintiffs are a foreign government, not in any way amenable to this Court. It has submitted itself to the jurisdiction of this Court in this matter by filing a bill; but this Court has no power to enforce an undertaking given by them; it has no power to enforce the payment; and if Messrs. *Erlanger* should lose their security, I am unable to see that they have any possible means of enforcing the payment of their debt. I am not aware of any means by which a British subject can enforce payment of a debt by a foreign government. If the foreign government repudiates, or fails to pay, all the British subject can do is to submit; he may pray and entreat, or remonstrate as much as he will, but he has no means, that I am aware of, of enforcing payment. If, therefore, the numbers are given, and the result should be to enable the *Costa Rica* Government to destroy the security for their own protection, they may do it. They may say, We are perfectly satisfied of our own rights; but all people take a strong view of their own case. They have done so here. They have not been very measured in the language, either in the bill or in the arguments at the bar, in which they charge Messrs. *Erlanger* with fraud in these trans-

actions; and, taking those strong views of their rights, they might feel themselves justified in issuing such advertisements in the newspapers as I have referred to. That, certainly, would be a mischief to the creditor who holds the security, and it is a mischief against which I find myself utterly incapable of providing any remedy.

Therefore, if it were not for that circumstance, or if it were a mortgage of land where the security could not be destroyed, it might be different; yet, considering the nature of these transactions, and doing that which Lord *Eldon* said was the proper thing to do, in the passage I have just read from *Bassford* v. *Blakesley* (1), looking at the surrounding circumstances to see whether the document should or should not be produced—if, I say, it were not for the mischief to which I have just adverted, in my opinion the production ought to be ordered. But, looking to the result, since I am unable to see that any benefit would arise by the production, while, on the other side, great mischief may arise to the creditor, whom I must regard as a creditor until he is shewn not to be so, and giving credit to the fact that £49,000 remains due to Messrs. *Erlanger* on the balance of accounts, and that payment of the money into Court is resisted—on these grounds I come to the conclusion that I cannot with propriety order the production of the bonds, although I adhere to my decision as to the two other descriptions of documents.

The result, therefore, is, that the motion partly fails and partly succeeds. And I think, considering the Plaintiffs succeed in two out of three of the objects, but the two least important, I will put the two against the one, and say the two are equal to the one. Therefore I think it is a divided success. There are two courses, either to leave each party to pay his own costs, or to make them costs in the cause, and I think the proper course will be to make them costs in the cause. It is one of the questions which naturally arise out of the contest.

Solicitors for the Plaintiffs: Messrs. *A. C. Edwards & Co.*

Solicitors for the Defendants: Messrs. *Bischoff, Bompas, & Bischoff;* Messrs. *Markby, Tarry, & Stewart;* Mr. *G. M. Clements.*

(1) 6 Beav. 131.

V.-C. B.
1874
Nov. 4, 5.

HYDE *v.* LARGE.

[1870 H. 19.]

Practice—Foreclosure—Decree pro confesso against some of the Defendants—Service of Decree out of the Jurisdiction ordered to be effected by Advertisement—Cons. Ord. xxii., rr. 11, 12, 15.

In a foreclosure suit, by a mortgagee who had been in possession twelve years, against several Defendants, trustees and beneficiaries under the will of the original mortgagor—some of whom were out of the jurisdiction in *America*—the bill having been ordered to be taken *pro confesso* against the Defendants out of the jurisdiction, and at the hearing none of the Defendants appearing, service of copy of the decree upon the Defendants out of the jurisdiction was permitted to be made by advertisement in two *London*, and one American, newspapers.

MOTION for decree.

The bill stated a mortgage of freehold hereditaments dated the 23rd of February, 1826, for 500 years, to *Richard Hyde*, the death of the mortgagee in 1844, and the various mesne assignments and other acts whereby the mortgage debt and securities became vested in the Plaintiff, *William Hyde*. It then stated the will of the original mortgagor, whereby the Defendants, some of them as executors and trustees, and others as beneficiaries, were entitled to the equity of redemption in the premises.

In or about 1862, the Plaintiff entered into possession of the property.

The bill, filed on the 4th of May, 1870, prayed for an account and payment, or foreclosure, in the usual form in favour of a mortgagee in possession.

On the 17th of January, 1871, the bill was amended.

On the 28th of January, 1871, an order was made for leave to serve out of the jurisdiction four of the Defendants named *Matthias Proctor*, *Harriet Proctor*, *Mary Proctor*, and *Mary Stainbank*, who were understood to be resident in *America*, with copy of the bill and interrogatories.

On the 29th of May, 1873, the bill was ordered to be taken *pro confesso* against the above four Defendants at the hearing.

In March and April, 1874, twelve of the Defendants who were

living in this country were duly served with notice of motion for decree in the cause.

At the hearing of the motion for decree, none of the Defendants appeared, and a decree was taken accordingly.

Immediately after the decree,

Mr. *Bovill*, Q.C., and Mr. *Lake Onslow*, for the Plaintiff, applied, *ex parte*, to appoint three months after service of the notice required by Rule 11 of Cons. Ord. XXII. in cases of non-absolute decrees, as the time within which the Defendants out of the jurisdiction must apply if they desire permission to answer the bill, and set aside the decree; and further asked for an order that service upon those Defendants might be duly effected by advertisement in the *Times* and two other *London* daily papers. This course was adopted by Vice-Chancellor *Malins* in an unreported case of *Canter* v. *Wodehouse* (1); and was understood to be the practice of the Court. *Darlow* v. *Simcock* (2) was also referred to.

The VICE-CHANCELLOR desired to have authentic information of what was done in *Canter* v. *Wodehouse*.

(1) V.-C. M. 1874. June 3; Aug. 7.

CANTER *v.* WODEHOUSE.

[1872 C. 192.]

THE bill was filed on the 28th of August, 1872, by *Mary Canter* against *Herbert Wodehouse*, stating a mortgage made by the Defendant to the Plaintiff, and praying for an account and payment, or in default foreclosure, in the usual form.

On the 8th of November, 1872, the bill was amended.

On a motion made on the 21st of November, 1872, upon an affidavit that the Defendant had been within the jurisdiction within two years before the filing of the bill, and that all due diligence had been used to serve him, but without effect, it was ordered that the Defendant do appear on or before the 21st of December then next, and the Plaintiff was to cause a copy of the order, together with a notice, as set forth at foot of Cons. Ord. x., rule 6, to be inserted in the *London Gazette* and two *Middlesex* newspapers.

By another order, dated the 11th of January, 1873, the Plaintiff was ordered to be at liberty to enter an appearance for the Defendant; and on the 21st of January appearance was entered.

On the 25th of April, 1873, an order was made that the bill be taken *pro confesso* against the Defendant at the hearing.

June 3. Mr. *G. Hastings*, for the Plaintiff, moved for the usual foreclosure decree; and that service of notice of the decree, copy decree, and summons to proceed, should be deemed to be good service on the Defendant if inserted in

(2) 14 W. R. 664.

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V.-C. B. 1874 HYDE v. LARGE.

Nov. 5. Upon the cause coming on again to-day, and production of office copies of the orders in *Canter* v. *Wodehouse*,

SIR JAMES BACON, V.C., said:—

I think, looking at the situation of the parties in this case; seeing that the original mortgagee is dead; that the Defendants are executors and devisees of the original mortgagor; that none of them appear, and that the decree is taken against those of them who are in this country upon affidavit of service only; and that the Plaintiff has now been in possession for twelve years, that the order may be made as prayed, and that service of the copy of the decree may be made on the Defendants out of the jurisdiction by advertisement. But I think the advertisement should appear in at least one American paper, as well as in English ones.

The following are minutes of the order:—

Decree to be taken *pro confesso* against the Defendants out of the jurisdiction.

Usual foreclosure decree for mortgagee in possession, against all the Defendants.

Plaintiff to be allowed all sums expended by him in necessary repairs and lasting improvements, or necessary outlay.

Inquiry to ascertain amount which, when ascertained, the Plaintiff is to be at liberty to add, with interest, to his security.

Plaintiff to be at liberty to serve this decree and summons to proceed under it,

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the *London Gazette* and two other newspapers.

THE VICE-CHANCELLOR made an order that the bill be taken *pro confesso*; for an account of what was due to Plaintiff under and by virtue of the mortgage and of her costs of suit; upon payment within six months a re-assignment; but in default, foreclosure; and the order continued:—"But this decree is subject to the provisions of the rules contained in the 22nd of the Consolidated Orders as to making absolute decrees founded on bills taken *pro confesso*; and it is ordered that the Plaintiff be at liberty to serve this decree and the summons, to proceed under the same by advertising the same once in the *London Gazette* and twice in the *Times* newspaper and twice in the *Daily Telegraph* newspaper."

Subsequently, on the 6th of August, 1874, His Honour ordered, upon motion, that service on the Defendant of the warrant on leaving, and the warrant to tax should be dispensed with, and that the Defendant should have notice of the time and place fixed by the certificate by advertising the same as mentioned in the decree.

Solicitors: Messrs. *Deane, Chubb, & Co.*

and notice of time and place of payment fixed by the certificate, on the Defendants against whom the bill was ordered to be taken *pro confesso*, by advertising the same in the *London Gazette*, the *Times* newspaper, and some public paper in *America* to be named.

Service of application under Rule 11 of Consolidated Order XXII. limited to three months after advertisement; and Plaintiff to be at liberty to proceed under such decree at the expiration of such three months.

Warrant on leaving and warrant to tax costs dispensed with.

Affidavit of Plaintiff of 24 July, 1874, to be entered as read.

Liberty to apply.

Solicitor: Mr. *Richard Dickson.*

C. J. B.
1874
Nov. 10.

Ex parte LINDSAY. *In re* LINDSAY.

Bankruptcy Petition—Adjudication—Evidence in support of Petition—Delegation of Judicial Authority—Deputy-Registrar—Power to make Adjudication—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 8, 10, 67—*Bankruptcy Rules*, 1870, *rr.* 1, 3, 36, 37—*Bankruptcy Forms*, 1870, *Nos.* 11, 12.

3 Ch. D. 453.
5 Ch. D. 210

At the hearing of a bankruptcy petition, even though the respondent has given no notice of his intention to shew cause against the petition, and does not appear, the allegations contained in the petition must be supported by further evidence than the common affidavit (No. 11).

That affidavit is made only for the purpose of justifying the sealing of the petition.

The Deputy-Registrar of a County Court may have delegated to him by the Judge the power of making an adjudication of bankruptcy.

THIS was an appeal from an adjudication of bankruptcy made by the Deputy-Registrar of the *Newcastle-on-Tyne* County Court, against *Edward Lindsay*, a trader.

On the 20th of August, 1874, a bankruptcy petition against *Lindsay* was presented by a creditor named *Proctor*. The petition was served on *Lindsay*, and the 31st of August was fixed for the hearing.

The petition contained allegations of the trading and of the petitioning creditor's debt, of an act of bankruptcy having been committed within six months, and also a general allegation that the act of bankruptcy was (following the words of sect. 6, subsect. 2, of the *Bankruptcy Act*, 1869), that *Lindsay* had "made a fraudulent conveyance, gift, delivery, or transfer of his property, or of part thereof," but there was no more specific allegation of any particular act of bankruptcy. The usual affidavit (following No. 11 of the *Bankruptcy Forms* of 1870) was made in support of the petition, that the several statements therein were true. *Lindsay* gave no notice, as required by rule 36 of 1870, of his intention to shew cause against the petition. The hearing was commenced before the Registrar on the 31st of August, and was adjourned to the 7th of September. *Lindsay* did not appear. On the 7th of September the adjourned hearing took place before

the Deputy-Registrar. *Lindsay* again did not appear. No other evidence than that already mentioned was adduced by the petitioning creditor to prove the commission of an act of bankruptcy. The Deputy-Registrar was of opinion that the allegations of the petition were sufficiently proved, and made the adjudication. *Lindsay* appealed.

Mr. *Little*, Q.C., and Mr. *Bagley*, for the Appellant:—

There is no allegation in the petition of any specific act of bankruptcy. This is not a proper compliance with sect. 6 (1) of the Act. The affidavit that the allegations of the petition are true, is not a sufficient proof, under sect. 8 (2), to justify an adjudication.

Reliance may be placed on Rule 37 (3), but that only means that if the petition contains a sufficient allegation of an act of bankruptcy, and there is a proper affidavit in support of it, the Court has a judicial discretion to make an adjudication. At any rate, we contend that a Deputy-Registrar cannot make an adjudication. The Judge may, by sect. 67, delegate his powers to the Registrar. The rules 1 and 3 narrow this power of delegation (4).

(1) Sect. 6 provides that a bankruptcy petition is to allege one or more of certain acts or defaults, called acts of bankruptcy, among which is,

Sub-s. 2: "That the debtor has, in *England* or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof."

(2) By sect. 8, at the hearing of the petition "the Court shall require proof of the debt of the petitioning creditor, and of the trading, if necessary, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with such proof, shall adjudge the debtor to be bankrupt."

(3) Rule 36: "Where a debtor intends to shew cause against a petition he shall file a notice with the Registrar, shewing the statements in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor a copy of the notice three days before the day on which the petition is to be heard."

Rule 37: "If the debtor does not appear at the hearing, the Court may make adjudication without further proof of the statements in the petition, if it shall think fit."

(4) Sect. 67: "The Chief Judge in Bankruptcy, and every Judge of a local Court of Bankruptcy, may, subject and in accordance with the Rules of Court for the time being in force, delegate to the Registrar, or to any other officer of his Court, such of the powers vested in him by this Act as it may be expedient for the Judge to delegate to him."

Rule 1 provides that, in construing

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By the Act 9 & 10 Vict. c. 95, s. 24, the Registrar of a County Court must be a solicitor; the Deputy-Registrar need not have any such qualification.

Mr. *De Gex*, Q.C., and Mr. *Doria*, for the petitioning creditor:—

The allegation in the petition followed the very words of sect. 6, sub-sect. 2, and it gave ample notice to the debtor of the act of bankruptcy intended to be relied upon. The debtor, by giving no notice under Rule 36, and by not appearing on the hearing, must be taken to have admitted the truth of the allegations in the petition, and Rule 37 authorized the making of the adjudication without any further evidence. This adjudication has been advertised, and by sect. 10 the advertisement is made conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt.

They were not called upon with regard to the jurisdiction of the Deputy-Registrar.

SIR JAMES BACON, C.J.:—

In my opinion this adjudication cannot be sustained, for the provisions of the statute have not been regarded. The petition alleged the commission of an act of bankruptcy in the words of sect. 6, sub-sect. 2, and it was accompanied by an affidavit verifying generally the truth of the allegations according to the Form No. 11. The reason for requiring that affidavit to be made is, that it would not be right that the petition should be received by the Registrar without it; its only purpose is to justify the receiving of the petition and the sealing of a copy for serving, and it has nothing to do with the provision of sect. 8 of the Act, that the Court at the hearing is to require proof of the act of bankruptcy alleged in the petition. The Form No. 12 shews what kind of an

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the Rules, "Court" shall mean the Court having jurisdiction in the matter. "Registrar" shall mean a Registrar or any Deputy-Registrar of any such Court.

Rule 3: "The Judge of a local Court of Bankruptcy may delegate to a Registrar of his Court, but to no other officer, such of the powers vested in him by the Act, as such Judge may deem expedient to delegate, except the power to make an order to commit a person for contempt."

affidavit should have been made. The Court had before it no proof of the statutory requisites to the making of an adjudication, for a merely general affidavit proves nothing. By it the petitioner only pledges himself that he will adduce at the hearing the proof required by the Act. The affidavit is sufficient for the purpose of the sealing of the petition, but that is all. The debtor was not bound to offer any opposition to a petition thus framed and supported. As to sect. 10, that only makes the advertisement of an adjudication conclusive against all parties to any proceedings where the proof of it is necessary, so that it is not necessary to prove it as under the old practice. The Deputy-Registrar was probably misled by the non-appearance of the debtor into adopting the first formal affidavit as conclusive proof of the requisites to an adjudication. On this ground, therefore, the order cannot be sustained, and the adjudication must be annulled. But the petition must be referred back to the County Court, that it may be dealt with regularly. As to the other point, I did not hear Mr. *De Gex*, for by the Act and the Rules the words "Registrar" and "Deputy-Registrar" are made convertible terms. There being a proper delegation of the powers of the Judge, the Deputy-Registrar is no other officer than the Registrar.

Solicitors for the Appellant: Messrs. *Pyke, Irving, & Pyke,* agents for Messrs. *J. G. & J. E. Joel, Newcastle-on-Tyne.*

Solicitor for the Petitioning Creditor: Mr. *S. R. Hoyle,* agent for Messrs. *Hoyle, Shipley, & Hoyle, Newcastle-on-Tyne.*

M. R.
1874
Nov. 13.

COATES *v.* LEGARD.

[1873 C. 278.]

Demurrer—Administration Suit—Multifariousness.

Where the Plaintiffs have a common interest in all the matters comprised in a suit, the objection of a Defendant that he is not concerned in the whole subject-matter is one the allowance of which is in the discretion of the Court, which will be guided by considerations of convenience under the particular circumstances of the case.

The administratrix of an intestate assigned a share in a business forming part of the intestate's estate to trustees to pay the intestate's debts, and then for her, and subsequently assigned her own beneficial interest in the share to the same trustees on certain trusts. The next of kin, who were also co-heiresses of the intestate and interested under his marriage settlement, filed a bill against the administratrix, the assignees in trust of the share in the business, and the trustees of the settlement, for administration of his real and personal estate, and of the trusts of the settlement. The assignees in trust of the share in the business demurred for multifariousness:—

Held, that the various interests of the infants could be most conveniently ascertained in one suit; and, consequently, that the demurrer must be overruled.

DEMURRER.

By a settlement dated the 23rd of November, 1863, and made prior to the marriage of *John Wind Coates* and *Fanny Duncombe Shafto*, certain trust moneys called the *Shafto* trust premises, and a sum of £6000 to be raised under the trusts of another settlement of even date out of an estate called the *Pasture House Estate*, belonging to *John Wind Coates*, were settled upon trust, after the death of *John Wind Coates* and *Fanny Duncombe Shafto*, for such of their issue who should attain twenty-one, or marry under that age, as they should jointly by deed, or as the survivor should by deed or will, appoint; and in default, then as to the sum of £6000, upon trust for the children of *John Wind Coates* by his then intended or any other wife, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares; and as to the *Shafto* trust premises, upon trust for the children of *Fanny Duncombe Shafto* by her then intended or any other husband, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares.

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John Wind Coates died intestate in July, 1870, leaving issue of the marriage him surviving two infant daughters, *Gertrude Anne Coates* and *Blanche Frances Madeleine Wind Coates*, who were his co-heiresses at law and sole next-of-kin, and his widow was appointed administratrix.

No appointment was made of the trust premises under the joint power of appointment, nor had the widow exercised the separate power of appointment given to her by the settlement.

At the time of his death, *John Wind Coates* was carrying on the business of smelting iron ore in partnership with *John George Swan*, *Henry Van Straubenzee*, and *George Newcomen*; and in September, 1870, the widow exercised the option given to her by the articles of partnership of becoming a partner in the business in respect of *John Wind Coates'* share.

By a deed dated the 23rd of April, 1873, the widow, who was then about to marry again, assigned the share to *John George Swan* and *Joseph Dodds*, upon trust, after payment of the expenses of the trust, to apply the residue of the profits of the share, and, if necessary, the proceeds to arise from the sale thereof (which they were thereby authorized to make), in payment of the debts and liabilities of *John Wind Coates* then remaining unpaid; and upon full payment and satisfaction thereof, upon trust for the widow.

On the 26th of the same month the widow married *John Hawksworth Legard*, and, by a settlement made on the occasion of the marriage, she assigned several items of property, including her beneficial interest in the share of the partnership business, to *Swan* and *Dodds* upon certain trusts.

The bill was filed by *Gertrude Anne Coates* and *Blanche Frances Madeleine Wind Coates*, by *Ann Coates*, their next friend, against *John Hawksworth Legard* and *Fanny Duncombe*, his wife, and the trustees of the settlement made on the marriage of *John Wind Coates*, and *Swan* and *Dodds*. It alleged that *Swan* and *Dodds* had, under the deed of the 23rd of April, 1873, received large sums on account of the profits of the share, and were liable and ought to account for them in the suit; that there were debts owing by *John Wind Coates* at his death remaining unpaid, and it would be necessary to resort to his real estate for the payment thereof, but

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such real estate was far more than sufficient for the payment thereof; and that a considerable portion of his personal estate was still outstanding; and prayed that the rights and interests of the Plaintiffs in the real and personal estate of *John Wind Coates*, and also under the trusts of the settlement made on his marriage, might be ascertained and secured; that for the purposes aforesaid, or so far as might be necessary for such purposes, his real and personal estate might be administered, and the trusts of the settlement performed; and that some proper person might be appointed guardian of the Plaintiffs, and a suitable allowance made for their past and future maintenance and education.

Swan and *Dodds* demurred for multifariousness.

Mr. *Marten*, Q.C., and Mr. *F. T. Procter*, for the demurrer:—

We have nothing to do with anything except the share of the partnership business, and the suit ought to have been limited to that. The Plaintiffs have no right to include us in the administration of the real estate, and the performance of the trusts of the marriage settlement: *Jerdein* v. *Bright* (1); *Bent* v. *Yardley* (2). This is a stronger case of misjoinder of subjects than *Bouck* v. *Bouck* (3), where a bill filed by one of the next of kin of an intestate against his administrator for the administration of his estate, and also seeking, as against other Defendants, to set aside a deed whereby the Plaintiff had assigned a portion of his interest in the estate for their benefit, was held, on demurrer by the administrator, to be multifarious. The Court will not allow distinct subjects to be mixed up in one suit where it would be inconvenient to the Court, or unfair to some one or more of the parties to it: *Pointon* v. *Pointon* (4); and it will manifestly be unfair to us if we are to be kept before the Court until the intestate's affairs shall have been wound up, when all the relief sought against us might be had by a simple bill for an account against us individually.

Mr. *Southgate*, Q.C., and Mr. *G. Y. Robson*, for the Plaintiffs, were not called upon.

(1) 2 J. & H. 325.
(2) 2 H. & M. 602.
(3) Law Rep. 2 Eq. 19.
(4) Ibid. 12 Eq. 547.

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SIR G. JESSEL, M.R.:—

In April, 1873, the administratrix was about to be married again, and as her intended husband did not want to be mixed up in the affairs of her late husband, she assigned the share of the partnership business to Messrs. *Swan* and *Dodds*, upon trust to do the duty of the administratrix with respect to it. Clearly, Messrs. *Swan* and *Dodds* would be proper parties to a suit for the administration of the intestate's estate, since they must be parties to the taking of the accounts. The first ground of the demurrer was, that the bill seeks to administer the real as well as the personal estate, whereas Messrs. *Swan* and *Dodds* are interested in the personal estate only; but if the demurrer were to be allowed on this ground, it would be equivalent to holding that every bill filed against a legal personal representative, and praying for the administration of the real as well as of the personal estate of the testator or intestate, is demurrable. The other ground of the demurrer was, that the bill went on to pray that the trusts of the intestate's marriage settlement might be performed, and Messrs. *Swan* and *Dodds* had no concern with them. I regard the law with respect to multifariousness as settled by *Campbell* v. *Mackay* (1), that where all the Plaintiffs have a common interest in the whole of the matter comprised in the bill, the objection of multifariousness set up by Defendants who are concerned only in a portion of the subject-matter, is a question of discretion, to be determined upon considerations of convenience with regard to the circumstances of each particular case. The question is, according to *Pointon* v. *Pointon* (2), whether the various subjects as to which relief is sought are such as, if fit for discussion, can be properly dealt with in one suit. My opinion being that the various rights and interests of the infant Plaintiffs can be most conveniently ascertained in one suit, I must overrule the demurrer.

Solicitors: Messrs. *Sharp & Ullithorne;* Mr. *E. Peacopp,* agent for Messrs. *Coates & Son, Wetherby, Yorkshire.*

(1) 1 My. & Cr. 603. (2) Law Rep. 12 Eq. 547.

M. R. 1874 Dec. 12.

In re TRADERS' NORTH STAFFORDSHIRE CARRYING COMPANY.

Ex parte NORTH STAFFORDSHIRE RAILWAY COMPANY.

Company—Winding-up—Distress by Creditor—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.

A distress levied by a creditor of a company in course of winding up by or under the supervision of the Court, after the commencement of the winding-up, is void.

Secus, if the distress is levied by a party who cannot prove in the winding-up.

In re Exhall Coal Mining Company (1) and *In re Lundy Granite Company* (2) discussed.

ON the 8th of April, 1874, the *Traders' North Staffordshire Carrying Company, Limited*, passed an extraordinary resolution under sect. 129 of the *Companies Act*, 1862, for winding up the company voluntarily.

On the 11th of April, 1874, the *North Staffordshire Railway Company*, the owners of the *Trent and Mersey Canal*, seized and distrained upon eleven canal boats belonging to the *Traders' Company* for arrears of toll due to the railway company.

Such distress was levied under powers conferred on the original proprietors of the canal (to whose rights the railway company had succeeded) by a private Act of Parliament (1 Will. 4, c. x.); the material section (211) is set out below (3). The boats were not

(1) 4 D. J. & S. 377.

(2) Law Rep. 6 Ch. 462.

(3) Sect. 211: "And be it further enacted that the said tolls hereby made payable shall be paid at such place or places near the said navigation to such person and in such manner and under such regulations as the said company hereby established shall appoint; and in case of neglect or refusal of payment on demand of any of the tolls by this Act authorized to be demanded and taken, or any part thereof, or any arrears of such tolls, to the person appointed to receive the same, the said company may sue for the said tolls respectively by action of debt or upon the case in any Court of Record, and in every such action it shall be sufficient for the Plaintiffs to declare that under or by virtue of a certain Act intituled [here set forth the title of this Act] the said company, or their assignees or mortgagees, as the case may be, are lawfully possessed of or entitled to such tolls as in and by such action are sought to be recovered, and to allege when, where, how, and wherefore such

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In re TRADERS' NORTH STAFFORDSHIRE CARRYING CO. *Ex parte* NORTH STAFFORDSHIRE RAILWAY CO.

redeemed within five days from the levying of the distress, and the railway company became entitled under their said powers to sell the boats on the 17th of April. No sale was then made.

On the 24th of April a creditor's petition for winding up the *Traders' Company* was presented, and on the 25th of April an injunction was granted to restrain the company from selling the boats. On the 2nd of May an order was made for continuing the winding-up of the company under supervision.

The boats were afterwards sold by arrangement, and the proceeds of sale paid into a bank in the joint names of trustees for the two companies.

The liquidator now applied by summons that the sum standing in the names of the trustees might be paid to him.

Mr. *Fischer*, Q.C., and Mr. *Cozens-Hardy*, for the liquidator:—

Sect. 163 of the *Companies Act*, 1862, enacts positively that where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents. Here the winding-up commenced on the 8th of April: *Hodgkinson* v. *Kelly* (1); *Weston's Case* (2); the distress was not levied until the 11th of April. It will be said, however, on the authority of *In re Exhall Coal Mining Company* (3), that sect.

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tolls became payable to the said Plaintiffs; or such person so appointed as aforesaid may, and he or she is hereby empowered, to seize and take the goods or other things for or in respect whereof any tolls, or any arrears thereof, ought to have been paid, or any part thereof respectively, and the boat, vessel, or carriage laden therewith, and in like manner to seize and take any other boat or other vessel or carriage belonging to the person from whom such arrears shall be due, whether laden or empty, passing or being upon the said navigation and railways, or either of them, for any arrears of tolls due and payable to the said company, and to detain the same boats, vessels, and carriages until such payment shall be made, and also until payment of all tolls and arrears of the said tolls which may be due from the owner of such boat, or other vessel, carriage, or goods to the said company, together with reasonable charges for such seizure and detention, and if such distress shall not be redeemed within five days after the taking thereof, the same shall be appraised and sold in like manner as the law directs in cases of distress for rent."

(1) Law Rep. 6 Eq. 496.

(2) Ibid. 4 Ch. 20.

(3) 4 D. J. & S. 377. 10 Jur. N.S. 576

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163 is to be read in conjunction with sect. 87, which provides that where an order has been made for winding up a company, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose. Here no leave to proceed with the distress has been obtained.

[The Master of the Rolls:—I think the case ought to be dealt with in the same way as if the railway company were now asking for leave to proceed with the distress.]

Then it is submitted that such leave ought not to be granted. The object of that part of the *Companies Act*, 1862, which relates to winding-up was to prevent one creditor obtaining an undue preference over another. The effect of giving leave to proceed with the distress in the present case would be to sweep away from the general body of the creditors a large portion of the assets. Leave to proceed with a distress ought not to be given except where the refusal of leave would work gross injustice: *In re Lundy Granite Company* (1).

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for the railway company:—

The case of *In re Exhall Coal Mining Company* (2) shews that the Court has a discretion to grant leave in such cases, and that discretion ought to be exercised in our favour, inasmuch as our title to sell the boats was complete long before any injunction was granted: *In re Great Steam Ship Company* (3). The principle which guides the Court in these cases is, that creditors who have put in force their legal rights are not to be deprived of the fruits of their diligence.

Sir G. Jessel, M.R.:—

The only difficulty, to my mind, arising in this case has been caused by the decisions on the statute. The section of the Act of Parliament appears to me about as plain an enactment as was ever penned, and about as easy to understand as any section of

(1) Law Rep. 6 Ch. 462. (2) 4 D. J. & S. 377. 10 Jur. N.S. 5
(3) 4 D. J. & S. 63.

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an Act of Parliament could possibly be. The words of sect. 163 are: "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." It is not disputed in the case before me that the commencement of the winding-up was the 8th of April, 1874; it is not disputed that the distress in question was made upon the 11th of April, 1874; and it is not disputed, also, that an order for winding up the company, which is still in force, was made on the 2nd of May, 1874, and that it is an order to wind up under supervision. The consequence is that every word of that section apparently applies, and the distress is void to all intents. The distress in question was made by the *North Staffordshire Railway Company*, who, having succeeded to the business and rights of a canal company, had, under a private Act of Parliament, the usual powers either of bringing an action against their debtor for arrears of tolls due by him, or in the alternative of seizing any barge of the debtor which might happen to be on the canal in the shape of a distress, and selling it according to the ordinary law of distress, paying themselves out of the proceeds of that sale the arrears of debt due by the debtor to them. It, therefore, is exactly the case of a creditor of the company electing to get execution, for that is what it is, though a summary one by way of distress instead of by way of action of debt. In substance it is getting payment by the creditor out of the goods of his debtor, and a preferential payment as between that creditor and the other creditors of the debtor; and, as I understand it, the very object and meaning of the Act of Parliament was to prevent any such preference being obtainable after the commencement of the winding-up.

It appears to me, therefore, that if we look either at the words of the section or at the spirit and meaning of the enactment, they both point the same way, namely, to prevent this particular creditor getting a preference out of the goods of the debtor.

But then it is said that there are decisions of the Court of Appeal in Chancery (which I need not say are binding upon me) which have decided the exact contrary to be the meaning of the

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Act of Parliament. I cannot but say that there has been addressed to me an argument fairly founded upon one, if not upon both of those decisions. Difficulties not at first sight easy to be got over do arise from a consideration of those decisions. In the case of *In re Exhall Coal Mining Company* (1), which was the first of those decisions, the company was not the debtor of the landlord; the actual tenant of the landlord was a person who was in effect the trustee for the company. At law, and for certain purposes in equity also, the company were strangers to the landlord. The landlord, after the commencement of the winding-up, that is, after the presentation of the Petition (it being the case of a compulsory winding-up), put in a distress, and under that distress he took some of the goods of the company, which were upon the land or in the mine, and the question was whether the 163rd section avoided that distress. It was held, first by the late Master of the Rolls, and afterwards by the Lords Justices on appeal, that the distress was valid and ought to be enforced. The two Lords Justices did not agree in their reasons. According to the report, Lord Justice *Knight Bruce* gave as a reason, after stating that the proposition of the Appellant was altogether unreasonable and unjust, that there was nothing in the 163rd section which made "it incumbent upon the Court to say, when a distress has been put in force before the making of the winding-up order, that the company was then being wound up within the meaning of the 163rd section." Speaking with the greatest deference, His Lordship appears in that to have fallen into a mistake, for the very words of the section are, that where the company is being wound up by the Court, the distress which is to be void is the one made after the commencement of the winding-up; not after the winding-up, but after the commencement of the winding-up. The words "being wound up" must refer to a period after the order for winding up is made. Every company is being wound up from the time when the order to wind up is made until the winding-up is terminated. However, Lord Justice *Turner* did not concur in the view so expressed by Lord Justice *Knight Bruce* of the 163rd section, and therefore, as the Lords Justices differed in their view, I think I am entitled to adopt my own. The Lord

(1) 4 D. J. & S. 377. *10 Jur. N.S. 576*

Justice *Turner* concurred in the decision for another and a totally different reason, and his reason was that the 163rd section of the Act was only to avoid attachments, &c., where leave had not been given under the 87th section. That is quite a different ground. The 87th section empowers the Court to give leave to proceed with actions; of course, if the Court could give leave to go on with an action up to and including execution, it is quite absurd to say that the execution under that action shall be void, and the two sections cannot stand together except with the interpretation given by Lord Justice *Turner*, that the 163rd section does not avoid any execution when leave has been given by the Court to prosecute the action. The two sections may well be read together, taking the 163rd section to be subject to an exception where the Court gives leave under the 87th section. That was the view of Lord Justice *Turner*.

Then the matter came before the present Lords Justices, in the case of *In re Lundy Granite Company* (1). In that case, as in *In re Exhall Coal Mining Company* (2), the company was not the tenant. The person who was tenant was the person who, I suppose, was a trustee for the company. The company was not the tenant, but was the equitable owner of the lease; the original lessee, or some assignee from him, was the tenant. Now, the landlord distrained after the winding-up order, not merely after the commencement of the winding-up, and the question was, he having taken the goods of the company, whether the distress was valid. The late Master of the Rolls held that it was not valid. There was an appeal from that decision, and the order was reversed, but the judgment of the Lords Justices, as I understand it, takes this distinction, that where the right of the landlord against his own tenant, not being the company, is not the right of a creditor of the company, but is simply the right to take the goods, whosesoever they happen to be, the 163rd section has no application. Of course there is considerable difficulty in the words, but the meaning that they put upon the section was this, that it must be a distress against the estate or effects of the company as estate or effects of the company—that is, a distress which could not have been validly made in any other character. I do not say that I can find the

(1) Law Rep. 6 Ch. 462. (2) 4 D. J. & S. 377. 10 Jur. N.S. 576

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words in the section, but that is the decision, and a reason is given for it which appears to be of considerable cogency, if I may say so with great respect, and that is this, that the meaning of the Act was to ensure equality amongst the creditors, and the creditor whose proceeding was restrained was to come in and prove with the rest; but in the case before their Lordships the landlord was not a creditor at all, and therefore, instead of producing equality, it would have produced inequality, by depriving him of his legal right to a distress, and giving him nothing at all. It seems to me, as I said before, that that is a reason of very great force. As I read the decision, therefore, it merely amounts to this, that where the landlord is a stranger, but is not a creditor of the company, and where he seizes the goods under his ordinary rights of landlord, as being a stranger's goods on the lands of his tenant, the 163rd section does not apply. I must say, it appears to me, although I do not find the words, that the reason, the spirit, and the meaning of the Act are entirely in accordance with the decision of the present Lords Justices in *In re Lundy Granite Company* (1). Of course, as I said before, if it were not so, you would destroy the right of the landlord, and you would give him nothing in return.

Now that that is really the view of their Lordships I think may be gathered from some passages in their judgments. Lord Justice *James* says this (2): "We must consider what is the position of a stranger under the Act, the landlord having the power of distress against the tenant. [His Lordship read the 163rd section.] Now these words cannot be taken as meaning that the distress is to be absolutely void to all intents, or else the Court would have no jurisdiction to allow the landlord to proceed"—that is in accordance with Lord Justice *Turner's* decision in *In re Exhall Coal Mining Company* (3)—"and, moreover, a distress would be void as against another lessee if the goods of the company were left on the land and were taken. But it is impossible that a distress on land can be void merely because the company have goods there." With the greatest possible respect to the Lord Justice, I do not think that that is a fair construction—a distress put in force to be

(1) Law Rep. 6 Ch. 462. (2) Law Rep. 6 Ch. 466.
(3) ~~Law Rep. 6 Ch. 467.~~ Godg. J. S. 377. 10 Jur. N.S.

void to all intents must mean so far as regards the goods of the company. It never could have been read, I think, fairly to make it void against other people. No doubt that is the literal meaning of the words, but I do not think that that is a fair construction. Then his Lordship says: "In no other part of the Act is any person dealt with except the company, its creditors, and its contributories. The sole object of the Act was to make an equitable provision in the nature of a bankruptcy for the distribution of the effects of the company amongst the persons entitled, but not to alter any other rights which they might acquire during the winding-up." That, if I may say so, is a proposition which commands my most cordial assent. Then he goes on to say: "If the official liquidator chooses to leave goods in the order and disposition of a bankrupt, there is nothing, so far as I can see, to prevent the assignee from taking them; and so if he leaves goods in a house where a landlord has a right to distrain, the official liquidator must take the consequences. It must be the true meaning of the Act to consider these provisions as confined to proceedings by a creditor of the company against the goods of the company; and the Act must be read according to the manifest intention, which could not have been that during the many years over which the winding-up may extend, the Court should have power to interfere with the rights of every one who happened to have goods of the company in his possession. The landlord has a right to proceed against his tenant, and against the goods of every stranger which happen to be upon the land, and subject to distress." I think that that entirely makes out the proposition I have mentioned, that the exception from the operation of the 163rd section is confined to the case, which was the one before their Lordships, viz., that of a stranger taking the goods of the company. Then Lord Justice *Mellish* says: "It is a question of general importance whether this section relates only to distress against the company, that is to say, where the company is the debtor, or extends, as has been contended, to all cases of distress"—He takes, in fact, the same distinction where the company is the debtor—"The landlord is by the law of this country entitled to take as a security for his rent the goods upon his land, whomsoever they belong to. Then, was it intended to deprive the landlord of

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that right if the goods happened to belong to a company under liquidation? It would be very extraordinary if the Legislature had deprived the landlord of that right, without clear and express words, and without giving him any compensation. The right to prove debts is confined to creditors of the company, and if this section makes this distress void, I do not see what power the Court would have to say that the landlord has any right to prove for his debt."

It therefore seems to me plain that both of the present Lords Justices take this, which I may say, with great respect, appears to me to be a very sensible, view of the Act. It would be monstrous to hold that this section deprived the landlord of his right to take the goods of a stranger to him, simply because the stranger was a company in liquidation, without giving him the correlative right of proving against the company's assets, and being paid *pro ratâ* with the company's creditors. It never could be intended to do more than insure a just distribution amongst the creditors. The case I have before me is the very case that was put as an illustration by Lord Justice *James*—it is a distress by a creditor against the goods of the company, his debtor. It is an attempt by the creditor to obtain a preference as between himself and the other creditors, and it is a preference obtained, or sought to be obtained, after the commencement of the winding-up.

I hold, therefore, that the claim of the railway company is ill-founded, and that the whole of the money belongs to the liquidator.

Solicitors: Messrs. *Worthington Evans & Co.*, agents for Mr. *W. H. Bishop, Stoke-upon-Trent;* Messrs. *Burchell.*

TODD *v.* MOORHOUSE.

M. R.
1874
Dec. 14.

[1872 T. 52.]

Settlement—Tenant for Life—Shares—Calls—Advances by Tenant for Life—Lien—Interest.

A tenant for life under a settlement comprising shares has a lien on the shares for repayment with interest of advances made at the request of the trustees for the purpose of paying calls on the shares, even though the trustees might, by exercising powers vested in them, have raised the necessary money otherwise.

BY a settlement, dated the 10th of July, 1845, made on the marriage of the Plaintiff, *Ralph Todd*, with *Mary Tetley*, his second wife, the trusts of a sum of £6000, then in the hands of the trustees of the settlement, were declared to be to invest the same in (amongst other things) the purchase of shares, stocks, funds, debentures, or scrip of any railway company or railway companies in the *United Kingdom*, and to sell, vary, and transpose the investments from time to time, and to stand possessed of such investments upon trust to pay the income to *Mary Tetley* during her life for her separate use, without power of anticipation, and after her death to pay the income to the Plaintiff (in case he survived her) during his life; and, subject to such life interests, upon trusts for the benefit of five daughters of the Plaintiff by a former marriage.

Part of the £6000 was invested in the purchase of forty-six shares in the *Leeds and Dewsbury Railway and Canal Company*, and twenty-nine shares in the *Leeds and Manchester Railway Company*. On these shares, calls amounting in the whole to £463, were made in or about 1848.

The bill alleged, and the Court found the fact to be, that Mrs. *Todd* at the request of the trustees advanced and lent to them out of her separate moneys, and for the purpose of avoiding the forfeiture or sale of the said shares, the sums necessary to pay the said calls: and accordingly the calls, amounting in the whole to £463, were, prior to 1852, paid by the trustees out of the advances made by Mrs. *Todd* for the purpose.

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The shares were subsequently converted into £1500 *London and North Western Railway* stock.

Mrs. *Todd* during her life received the whole income of the trust fund. She died in May, 1867, having made a will of which the Plaintiff was named executor; and letters of administration with the will annexed had been granted to the Plaintiff accordingly.

The bill prayed for a declaration that the Plaintiff, as the legal personal representative of his late wife, was entitled to a lien on the £1500 *London and North Western Railway* stock to secure the repayment of the said sum of £463 with interest from the death of Mrs. *Todd;* and for consequential relief.

The cause now came on to be heard.

Mr. *Bagshawe*, Q.C., and Mr. *Graham Hastings*, for the Plaintiff, referred to *Burridge* v. *Row* (1); *Rowley* v. *Unwin* (2): *Shearman* v. *British Empire Assurance Company* (3).

Mr. *Marten*, Q.C., and Mr. *E. Cutler*, for the trustees of the settlement.

Mr. *Whitehorne*, for the beneficiaries, insisted that a lien for payments in the nature of salvage only exists where the trustees could themselves advance the money and obtain a charge on the trust property for it; that wherever, as in the present case, the trustees could have raised the money necessary to make the payments by sale or otherwise, they could not create a charge in their own favour, still less in favour of another: *Darcy* v. *Croft* (4); *Clack* v. *Holland* (5). He also contended on the facts that Mrs. *Todd* intended the money as a gift: and that her acts during her lifetime precluded herself and her representatives from claiming a lien.

SIR G. JESSEL, M.R.:—

I should have been very sorry indeed if any Judge had ever stated the law in accordance with the proposition laid down by

(1) 1 Y. & C. Ch. 183.
(2) 2 K. & J. 138.
(3) Law Rep. 14 Eq. 4.
(4) 9 Ir. Ch. Rep. 19.
(5) 19 Beav. 262.

Mr. *Whitehorne.* The proposition he affirms is this, that if one of the *cestuis que trust* advances money for the purpose of paying a sum properly payable out of the *corpus* of the trust funds, then, unless it can be shewn that the trustees could not raise the money in any other way, the person advancing his money is to lose it. That is, the *cestuis que trust* are to be enriched by the amount advanced merely because the trustees by some possible means or other could otherwise have raised that amount, and the *cestuis que trust* can, therefore, keep both the money advanced and the property which ought to have been sold to raise the money. Common sense, common honesty, and sound law are altogether against any such extravagant notion.

The case of the Plaintiff is of the simplest possible kind.

[His Honour then stated the facts, and came to the conclusion on the evidence that Mrs. *Todd*, in advancing the money, was not making a gift, but was complying with the urgent request of the trustees in order to prevent the shares being sold or forfeited: and he then continued:—]

There is, to my mind, no defence whatever, and I think the Defendants would have done well to have admitted the claim. Their first defence was that monstrous proposition of law to which I have adverted, which I think does not deserve any further consideration. Their second defence is that the lady intended it as a gift and not as a loan. When we look at the evidence I think there can be no question whatever, even if the *onus probandi* were, as it is not, on the Plaintiff, because this lady was not the mother but the step-mother of the children who were entitled in remainder to these trust funds, and there was no presumption of law that she intended a gift to them, and there is no presumption of fact. Then it is said she never made this claim in her lifetime; but why should she make a claim? She was receiving the dividends on the shares; she did not want them to be sold; the very object she had in advancing the money was to prevent the shares being sold. Both she and the trustees thought that a sale would be an injury to everybody; and so it has turned out, for the shares, as I have been informed at the Bar, have risen very much in value. But after her death, when her interest has ceased, her administrator requires

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to be repaid the money: and I must say I never saw a clearer case. I shall make a decree for the Plaintiff, directing £463 and interest to be raised, and I shall give him the costs of the suit.

Solicitors: Mr. *H. M. P. Sheppard;* Messrs. *Torr, Janeway, & Co.*, agents for Messrs. *Simpson & Burrell, Leeds;* Mr. *W. G. Brighten;* Messrs. *Iliffe, Russell, & Iliffe.*

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FINNEGAN *v.* JAMES.

[1874 F. 70.]

Patent Suit—Practice—Delivery of Particulars of Breaches and Objections—15 & 16 Vict. c. 83, s. 41.

The practice prescribed by the statute 15 & 16 Vict. c. 83, s. 41, with respect to actions at law for the infringement of letters patent ought to be followed in suits in equity as closely as circumstances will permit.

A Plaintiff in a patent suit ought either to state in his bill the particulars of the breaches complained of, or to deliver along with his bill a written statement of such particulars, which statement need not be filed. A Defendant in a patent suit ought to set forth in his answer the particulars of any objections on which he relies.

2 Ch D. 536-7
538-9
— 2 Ch D. 824
828
18 Ch D 81
22 Ch D 630

THIS was a suit to restrain the infringement of a patent.

The Plaintiff had filed interrogatories requiring the Defendants (amongst other things) to set forth to the best of their knowledge, information, and belief, full particulars, specifying the names and addresses of the persons by whom, the places where, the dates at and the manner in which the Plaintiff's invention was alleged by the Defendants to have been used before the date of the Plaintiff's patent in the said bill mentioned. The Defendants declined to set forth such particulars, on the ground that the matters inquired after related exclusively to the defence. The Plaintiff filed exceptions, which now came on to be heard.

Mr. *Cookson*, for the Plaintiff:—

It may be admitted that under the general practice of the Court the Defendant would not be required to furnish such particulars;

but the practice in patent suits is regulated by 15 & 16 Vict. c. 83, s. 41, which enacts that such particulars shall be given by the Defendants. [He was stopped.]

Mr. *Lawson*, for the Defendants:—

It is clearly settled that the Defendants are not bound to give the discovery sought by this interrogatory at this stage of the cause: *Daw* v. *Eley* (1); *Bovill* v. *Smith* (2). The provisions of the statute apply to actions at law, and are not adopted in equity unless issues are directed: *Bovill* v. *Goodier* (3). The Defendants would be placed at great disadvantage if they were required to furnish these particulars now, for they would not be able to adduce at the hearing any other instances of prior user.

[The MASTER OF THE ROLLS:—I should not tie the Defendants so strictly as that; but if they set up any other instances of prior user, I should expect them to shew that they discovered them after the answer was put in, and also that they gave proper notice to the Plaintiff of their intention to use them at the hearing.]

At all events the Plaintiff ought to furnish particulars of the breaches on which he relies; he has not done that, and the Defendants ought not to be required to put in a further answer until the Plaintiff has furnished those particulars.

SIR G. JESSEL, M.R., said that he saw no reason why the practice as to furnishing particulars should be confined to cases in which the Court directed issues. In his opinion the practice at law ought to be followed as closely as circumstances would admit; and sufficient consideration had not been given to the effect of *Sir John Rolt's Act* (25 & 26 Vict. c. 42). The Plaintiff at Law was required by the statute (15 & 16 Vict. c. 83, s. 41) to deliver with his declaration particulars of the breaches complained of; and the Defendant was required to deliver with his pleas particulars of the objections relied on. By analogy, the Plaintiff in Equity ought either to state in his bill the particulars of the breaches complained of, or to deliver along with his bill a written statement of such particulars; and as particulars of breaches were often somewhat lengthy, it

(1) 2 H. & M. 725.
(2) Law Rep. 2 Eq. 459.
(3) Law Rep. 1 Eq. 35.

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would be cheaper, and therefore in most cases preferable, to deliver a separate statement, which need not be filed. The Defendant, on the other hand, ought in his answer to set forth the particulars of the objections he relied on; such objections were generally short, and there was no reason for putting them in a separate document. In the present case the exceptions would be allowed; but the Plaintiff must deliver particulars of the breaches complained of, and the Defendants would have fourteen days from the time of such delivery to put in a further answer: the costs to be costs in the cause.

Solicitors: Mr. *T. R. Kent;* Messrs. *Western & Sons.*

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HOPKINSON *v.* FORSTER.

[1873 H. 41.]

Banker—Cheque—Equitable Assignment.

19 CLD 412

A cheque is not an equitable assignment of the drawer's balance at his bankers.

Dicta in *Keene* v. *Beard* (1) commented on.

THIS was an interpleader suit instituted by Messrs. *Hopkinson*, bankers and army agents, for the purpose of ascertaining the rights of the claimants to a fund in their hands.

The Plaintiffs were the bankers of the Defendant *Forster*, who, up to the 7th of May, 1867, was a cornet in the 3rd Dragoon Guards. The Plaintiffs were also the agents of that regiment. On the 7th of May, 1867, *Forster* retired from the army, having sold his commission, and on the following day it became the duty of the Plaintiffs, as agents of the regiment, out of moneys placed in their hands as such agents and held by them subject to the directions of the military authorities, to issue to *Forster* the sum of £365 18*s.* 6*d.*, the price of the commission. On that date a balance of £38 4*s.* 8*d.* was standing to *Forster's* credit on his private banking account.

(1) 8 C. B. (N.S.) 372.

Various claims having been made to the proceeds of the sale of the commission, this suit was instituted, and the Plaintiffs paid into Court the sums of £365 18*s.* 6*d.* and £38 4*s.* 8*d.*

The cause now came on to be heard. Amongst other claims made to the fund in Court, was one by the Defendant Dr. *Cullen*, which arose under the following circumstances:—

Dr. *Cullen* was assistant-surgeon in the regiment to which *Forster* belonged. In February, 1867, the regiment was quartered in *India*. On the 25th of that month *Forster* applied to *Cullen* to change a cheque for him, and *Cullen* accordingly advanced *Forster* £50, he giving *Cullen* a cheque for that amount, dated the same day, and drawn on the Plaintiffs. On the 23rd of April, 1867, the Plaintiffs received a letter from *Forster* in the following terms:—

"Before leaving *India* I drew some cheques on you, which I hope have been met before this by my commission money. If they have not, please let me know; also, how soon I may expect my commission. I also wish you to place £25 to Captain *Fitzgerald's* credit and £50 to Dr. *Cullen's*, as soon as possible."

The cheque was presented on the 23rd of May, 1867, and was dishonoured.

Mr. *Chitty*, Q.C., and Mr. *Cracknall*, for the Plaintiffs.

Mr. *A. T. Watson*, for Dr. *Cullen*:—

First, the letter written by *Forster* created a charge in my favour.

[The MASTER OF THE ROLLS:—You can have no charge in equity without an intent to charge. The letter on which you rely was not written with any intent to charge the fund; it was a mere letter of instructions to the bankers.]

Secondly, the cheque itself constitutes a good equitable assignment. In *Keene* v. *Beard* (1), Mr. Justice *Byles* says, with respect to a cheque, this: "In one respect it differs from a bill of exchange, it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn for the purpose

(1) 8 C. B. (N.S.) 372.

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of discharging a debt or liability of the drawer to a third person; whereas it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange." That shews my claim to be good, at all events, to the £38 4*s.* 8*d.*

Mr. *Roxburgh*, Q.C., Mr. *Graham Hastings*, Mr. *Davey*, Mr. *Kisch*, and Mr. *Everitt*, were for other Defendants.

[*Ex parte South* (1) and *Larivière* v. *Morgan* (2) were referred to.]

SIR G. JESSEL, M.R.:—

A cheque is clearly not an assignment of money in the hands of a banker: it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honour the cheque, when he has sufficient assets in his hands; if he does not fulfil his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr. Justice *Byles* in the case of *Keene* v. *Beard* (3); but I am quite sure that learned Judge never meant to lay down that a banker who dishonours a cheque is liable to a suit in equity by the holder.

His Honour decided on the other claims to the £365 18*s.* 6*d.*, but held that the £38 4*s.* 8*d.* had been improperly paid into Court, there being no conflicting claims as to it, and he directed the latter sum to be repaid to the Plaintiffs.

Solicitors: Messrs. *Frank Richardson & Sadler*; Messrs. *Fladgate, Clarke, & Smith*; Messrs. *Deane, Chubb, & Co.*; Mr. *Hacon*; Messrs. *Beyfus & Beyfus*; Mr. *Pierpoint.*

(1) 3 Sw. 392. (2) Law Rep. 7 Ch. 550.
(3) 8 C. B. (N.S.) 372.

GOWAN *v.* BROUGHTON.

V.-C. M.
1874
Nov. 7.

[1869 G. 160.]

Administration Suit—Expenses and Debts—Lapsed Share of Residuary Personal Estate.

A testatrix, being possessed of personal estate, gave to her niece, subject to all legacies and bequests, the residue of her estate up to the end of the year 1855; and she gave all accumulations from that date equally between her great-nephews. The share of residue to the niece lapsed by her death in the lifetime of the testatrix:—

Held, that the only residue was that given to the niece, which lapsed, and was liable to all the expenses and debts.

Semble, that wherever there is a lapsed share of residuary estate, whether personal or real, the lapsed share is the primary fund for payment of debts and expenses.

GEORGIANA SOPHIA BROUGHTON, by her will, dated the 24th of December, 1855, being possessed of and entitled to considerable personal estate, after divers specific and pecuniary bequests, gave and bequeathed to her niece *Harriet Richmond*, subject to all legacies and bequests, the residue of her estate up to the end of the year 1855; and she gave and bequeathed all accumulations from that date in equal shares to the sons of her late niece *Georgiana Broughton*. The testatrix died on the 7th of January, 1869. *Harriet Richmond* died before the testatrix, whereby the legacy of the residue up to the end of the year 1855 lapsed, and became undisposed of, and was divisible amongst the next of kin of the testatrix living at her death.

The bill was filed for the administration of the testatrix's estate by her next of kin.

The cause came on for hearing on the 25th of June, 1872, when the Court declared that the funeral expenses and debts of the testatrix were to be paid out of the residue of the personal estate. And it was declared that there was an intestacy as to the residue, after deducting legacies and bequests, of the estate of the testatrix up to the end of the year 1855; and that such residue passed to the next of kin of the testatrix, and inquiries were directed as to

V.-C. M. 1874 GOWAN v. BROUGHTON.

the amount of the residuary estate and of the accumulations subsequent to the 31st of December, 1855.

The cause now came on upon further consideration, and a question arose whether the costs, debts, and expenses should be borne exclusively by the lapsed share of *Harriet Richmond*.

Mr. *Bristowe*, Q.C., and Mr. *Woodhouse*, for the personal representatives of the testatrix:—

The question we now have to submit to the Court is, whether the debts and expenses which have been thrown on the residue ought not to be borne equally by those taking the lapsed legacy and those to whom the other portion of the residue was bequeathed. The residue is given to two persons: one dies, and consequently that share lapsed; we now say that the lapsed share and the other portion of the residue must bear the costs equally. A similar point was decided by your Honour in *Ryves* v. *Ryves* (1); and in *Stead* v. *Hardaker* (2) it was held that the specifically devised estates and the descended estates were liable rateably to the payment of debts.

In *Eyre* v. *Marsden* (3) the costs of the suit were thrown upon the general estate of the testator, and upon the fund which had arisen from the excess of accumulations beyond the period allowed by the *Thellusson Act*. *Ackroyd* v. *Smithson* (4) is another case in our favour, and *Elborne* v. *Good* (5) is an authority distinctly laying down the same rule, where a fund arising from accumulations of the testator's estate, made after the period prescribed by the *Thellusson Act*, was claimed by the residuary legatees and by the next of kin adversely to each other, and the Court decided in favour of the next of kin, but ordered the costs of suit to be paid out of the fund composed of the residue and the lawful accumulations, and out of the fund in dispute *pro ratâ*. The rule laid down by your Honour in *Scott* v. *Cumberland* (6) had reference to real estate undisposed of, in which respect it differs from this case. Here the property consists of personal estate, and it was actually disposed of, but the legacy failed by lapse during the testatrix's

(1) Law Rep. 11 Eq. 539.
(2) Ibid. 15 Eq. 175.
(3) 4 My. & Cr. 231.
(4) 1 Bro. C. C. 503.
(5) 14 Sim. 165.
(6) Law Rep. 18 Eq. 578.

life. There is no case in which, as between lapsed personal estate and personal estate given to an individual, the lapsed estate has been made to pay all the costs.

Mr. *Glasse*, Q.C., and Mr. *T. H. Briggs*, Mr. *J. Pearson*, Q.C., and Mr. *Cecil Russell*, and Mr. *Bury*, for different Defendants, were not called upon.

SIR R. MALINS, V.C.:—

It is not necessary, in the view I take of this case, to decide the general question which has been argued. The question I have to decide is, whether the residue given to *Harriet Richmond*, the niece of the testatrix, and which lapsed by her death in the lifetime of the testatrix, is to bear the costs of the suit. The testatrix, after divers bequests, says: "I give and bequeath to my niece, *Harriet Richmond*, subject to all legacies and bequests, the residue of my estate up to the end of the year 1855. I give and bequeath all accumulations from that date in equal shares to the sons of my late niece, *Georgiana Broughton*." I think the construction of the will is, that the great-nephews take all the additions to the property made subsequently to the year 1855 as a pecuniary legacy, the amount of which was uncertain but is now ascertained; I decide, therefore, that it is a pecuniary legacy, and not residue at all. How, then, is the residue given? It is the gift to the niece, *Harriet Richmond*, subject to all legacies and bequests. I think there is but one residuary bequest here, and therefore that if *Harriet Richmond* had survived the testatrix, the costs must have been taken out of that portion, and that the pecuniary legacies would have been exonerated, and as she died before the testatrix, the costs will come out of that residue which lapsed by her death.

But the point having been raised as to whether a lapsed share of residue would exonerate a share of residue well bequeathed, I express my opinion upon it. I had to decide the same question as to real estate in *Scott* v. *Cumberland* (1), where there were lapsed shares of residuary real estate. I there came to the conclusion that the old rule always acted upon was, that a descended real estate exonerated the specifically devised estate, and I distin-

(1) Law Rep. 18 Eq. 578.

V.-C. M. 1874 GOWAN v. BROUGHTON.

guished that case from *Eyre* v. *Marsden* (1), where the testator began his will by directing that all his just debts and funeral and testamentary expenses should be paid by his trustees and executors therein named out of his real and personal estate. Everything, therefore, was charged, and that was the state of facts with which Lord *Cottenham* had to deal, and it was evident from the judgment that his expressions were regulated by that consideration. I expressed my opinion in that case, that the old rule that descended estates must exonerate devised estates remained in full force.

I consider that it would be very inconvenient if there should be one rule as to real and another as to personal estate. My opinion, therefore, is (although it is laid down differently in some of the text-books), that if a man gives his residuary personal estate in equal shares to *A.* and *B.* as tenants in common, and *A.* dies in the lifetime of the testator, so that the share of *A.* would lapse, in that case I think the undisposed of moiety of the residuary personal estate would, just as if it were real estate, exonerate the other moiety, and be the primary fund for payment of debts and expenses. I express that opinion, but it is not necessary for me to decide the point in this case. I believe it will be found in all the authorities cited in support of the proposition laid down in the text-books, that there was a charge, in the first instance, of debts and testamentary expenses on the whole of the residuary estate, and that the whole residue being once charged with the payment was not released by the lapse of a portion.

Solicitors for the Plaintiffs: Messrs. *White, Broughton, & White.*
Solicitors for the Defendants: Messrs. *Briggs & Vaughan.*

(1) 4 My. & Cr. 231.

V.-C. M.
1874
Nov. 16.

In re MACNICHOL.
MACNICHOL *v.* MACNICHOL.

[1872 M. 166.]

Foreign Judgment—Proof against Estate of Deceased Debtor—Administration in England.

Where judgment had been obtained in a foreign Court by the foreign administrator of a creditor against an English debtor who had since died, and whose estate was being administered in *England*:—

Held, that the foreign administrator could prove without taking out English administration to his intestate.

THIS was a suit for the administration of the estate of *Nichol Macnichol*, a shipbuilder, and now came on for further consideration.

Amongst the creditors included in the Chief Clerk's certificate was one *John Cave Orr*, a solicitor of *Calcutta*, who claimed, as the administrator in *Calcutta* of *William Cameron*, deceased, upon a judgment for a sum equivalent to £5277 1*s.* 7*d.*, obtained in *Calcutta* on the 1st of February, 1872, in the lifetime of *Nichol Macnichol*.

The liability of the estate of *Nichol Macnichol* to pay the claim was not disputed, but a question was raised in Chambers and reserved, whether Mr. *Orr* was entitled to receive a dividend on the amount of his claim without obtaining letters of administration in *England* to *William Cameron*.

Mr. *North*, for Mr. *Orr*:—

It appears that the point has already received judicial notice abroad, and that the decision was against the necessity of taking out administration: *Talmage* v. *Chapel* (1), cited in *Westlake* on International Law (2).

Mr. *Glasse*, Q.C., Mr. *Higgins*, Q.C., Mr. *Jason Smith*, and Mr. *Whitehorne*, appeared for the other parties.

(1) 16 Mass. 71. (2) Page 286.

V.-C. M. 1874 *In re* MACNICHOL. MACNICHOL *v.* MACNICHOL.

SIR R. MALINS, V.C. :—

The administrator having established his debt is in the position of a creditor here, and the answer to the point reserved is, that he is entitled to payment without becoming the personal representative in this country of the creditor.

Solicitors: Mr. *Wynne;* Messrs. *Farmer & Robins;* Mr. *Oehme.*

GRIERSON *v.* CHESHIRE LINES' COMMITTEE.

V.-C. B.
1874
Nov. 3, 4.

[1873 G. 17.]

Railway Company—Purchase of Manufactory—Notice to treat, followed by Notice of Intention to apply for the Appointment of a Surveyor—Withdrawal of Notice to treat—Specific Performance refused—Lands Clauses Act, 1845 (8 *Vict. c.* 18), *s.* 92—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 36.

A notice by the Defendants, a railway company, to treat for a part of the Plaintiffs' manufactory, was met by a counter-notice by the Plaintiffs, requiring them to take the whole. The Defendants then gave the Plaintiffs notice of their intention to apply to the Board of Trade for the appointment of a surveyor to determine the value of the premises comprised in the notice to treat, and of the further lands and hereditaments which the Plaintiffs could lawfully require and had required the Defendants to purchase and take. The Plaintiffs then filed their bill, praying for a declaration that the Defendants could not take a part of the manufactory without taking the whole; whereupon the Defendants gave notice of their intention to withdraw from their notice to treat, offering to pay the Plaintiffs' costs of suit up to that date; but the Plaintiffs declined the offer, and insisted on an answer, which was filed.

The bill was then amended, and, as amended, prayed for a declaration that the Defendants were bound to take the whole manufactory:—

Held, that the Defendants' notice of their intention to apply for the appointment of a surveyor did not amount to a binding contract by them to take the property; hence that they were at liberty to withdraw their notice to treat; and specific performance as prayed by the amended bill refused.

Marson v. *London, Chatham, and Dover Railway Company* (1) explained.

MOTION for decree.

The bill was filed by *Henry Houldsworth Grierson* and Sir *Eustace Fitzmaurice Piers*, Bart., carrying on business as iron-founders and mechanical engineers under the firm of "*Ormerod, Grierson, & Company*," at the *St. George's Ironworks, Hulme, Manchester*, against the *Cheshire Lines' Committee*, who were incorporated by the *Cheshire Lines' Act*, 1867, and empowered by the *Cheshire Lines' Act*, 1872, to construct a line of railway.

The land on which the Plaintiffs' works were carried on contained altogether about 11,775 square yards, and was crossed by

(1) Law Rep. 6 Eq. 101; Ibid. 7 Eq. 546.

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GRIERSON v. CHESHIRE LINES' COMMITTEE.

the *Manchester South Junction and Altrincham Railway*, the line resting on piers, and the line and piers together covering about 1120 square yards. The Plaintiffs used the archway spaces as part of their works. The severed portion towards the north-west was about 440 feet long, and varied in breadth from about 240 to about 245 feet.

On the 25th of July, 1872, the Defendants served the Plaintiffs with notice to treat for the whole of their land north-west of the *Manchester and Altrincham* line.

On the 11th of January, 1873, the Plaintiffs served the Defendants with a counter-notice to purchase the whole of their premises.

On the 24th of January, 1873, the Defendants served the Plaintiffs with a notice, dated the 22nd of January, whereby, after reciting the two above-mentioned notices, and that the committee were desirous of immediately entering upon and using the land and hereditaments comprised in the notice to treat, they gave the Plaintiffs notice of their intention to apply, after the expiration of seven days from the service thereof, to the Board of Trade, in pursuance of the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), s. 36, for the appointment of a surveyor to determine the value of the hereditaments and premises required by the notice to treat, "and of the further lands and hereditaments which the said Messrs. *Ormerod & Co.* can lawfully require and have required the said committee to purchase and take, or of the interest therein which the said Messrs. *Ormerod & Co.* are entitled to, or enabled to sell and convey, in order that the said committee may be enabled to exercise the powers of entering on the said hereditaments conferred by the Acts" thereinbefore mentioned.

On the 30th of January, 1873, the bill was filed, praying for a declaration that the Plaintiffs ought not to be required to sell or convey to the Defendants the said piece of land on the north-west side of the railway or any other part only of the Plaintiffs' said manufactory, the Plaintiffs being able and willing, and thereby offering, to sell and convey the whole thereof to the Defendants; and for an injunction to restrain the Defendants from entering upon or using the said piece of land, or otherwise interfering with the possession, occupation, and enjoyment thereof by the Plaintiffs, without purchasing the whole of the manufactory.

On the 31st of January an interim injunction was moved for *ex parte* and granted.

On the 26th of February, 1873, the Defendants served the Plaintiffs with a notice that they thereby withdrew and abandoned their notice to treat dated the 25th of July, 1872, and offered to pay the Plaintiffs' costs of suit as between party and party to the date of the notice, and the costs of the necessary order to stay further proceedings.

The Plaintiffs refused to accede to the Defendants' proposal to withdraw, and insisted on an answer.

On the 6th of March, 1873, the motion for an injunction was made and ordered to stand to the hearing.

The answer was filed on the 21st of April, 1873, in which the Defendants insisted on their right to withdraw their notice to treat.

The bill was then amended on the 17th of July, 1873, and as amended charged that the Defendants, after their notice of the 22nd of January, were not entitled to withdraw or abandon their notice to treat; and prayed for a further declaration in addition to the above, that the Defendants "were bound to take the whole" of the manufactory.

A case was attempted to be made in evidence, that from the way in which the piece of land north-west of the line was used, it was not part of the Plaintiffs' manufactory within the true construction of the 92nd section of the *Lands Clauses Act*, 1845 (8 Vict. c. 18); but the contention was not insisted on at the hearing.

Mr. *Kay*, Q.C., and Mr. *Marten*, Q.C., for the Plaintiffs:—

[On the construction of the 92nd section of the statute, they cited *Pinchin* v. *London and Blackwall Railway Company* (1); *Sparrow* v. *Oxford, &c., Railway Company* (2); *Furniss* v. *Midland Railway Company* (3); *Spackman* v. *Great Western Railway Company* (4); *Salter* v. *Metropolitan Railway Company* (5).]

The act of the Defendants in sending the notice of intention to apply for the appointment of a surveyor to value, constituted a

(1) 1 K. & J. 34; 5 D. M. & G. 851.
(2) 9 Hare, 436; 2 D. M. & G. 94.
(3) Law Rep. 6 Eq. 473.
(4) 1 Jur. (N.S.) 790.
(5) Law Rep. 9 Eq. 432.

(1) 1 Sc. & Jur. N.S. 39, 141

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valid contract, of which the Plaintiffs are entitled to have specific performance.

The Defendants are not at liberty to withdraw their notice to treat and abandon their intention of taking the property: *Marson* v. *London, Chatham, and Dover Railway Company* (1).

The prayer in the amended bill for a further declaration may be compared to a plea of *puis darrein continuance* under the old practice, in the argument of which the Courts always allowed the new matter to be discussed on the footing of the original action. If we had been resting on a notice by ourselves, an objection founded on the change in the character of the relief prayed might be listened to; but we rely on a notice by the Defendants, which has rendered it necessary for us to pray for another form of relief, as was found necessary in *Marson* v. *London, Chatham, and Dover Railway Company*. We are, in fact, merely taking the benefit of the prayer for general relief. At the filing of the bill the last intimation we had was that the Defendants were going to have the whole of the property valued; and up to that date it never entered the mind of any one to suppose that the Defendants were not bound to take, at any rate, some of the land.

Mr. *Jackson*, Q.C., Mr. *Speed*, and Mr. *W. P. Beale*, for the Defendants, were not heard.

SIR JAMES BACON, V.C.:—

The only question now of any importance in this case is, whether this bill can be properly treated as a bill for the specific performance of a contract completed by the notice of the 22nd of January, 1873.

Now, the law of the Court upon the subject of specific performance is very well understood—it is a discretionary authority, and I do not recollect any instance where the Court has decreed specific performance against the intentions of both parties. That is the case which this record presents to me. The bill is filed with the utmost propriety. The measure which the railway company had contemplated was unlawful; the Plaintiffs had a right to say, "If you take that which you describe in your notice to

(1) Law Rep. 6 Eq. 101; Ibid. 7 Eq. 546.

treat, and which is a part of our manufactory, you must take the whole of our manufactory;" and as the company had seemed to persist in intending to go on to take that which they had required, the bill was properly filed, the injunction was properly prayed for, and the relief prayed for by the original bill is exactly that to which the Plaintiffs were entitled. The bill originally prayed for a declaration "that the Plaintiffs ought not to be required to sell or convey to the Defendants, the *Cheshire Lines' Committee*, the said piece of land on the north-west side of the said *Manchester South Junction and Altrincham Railway*, or any other part only, of the said Plaintiffs' manufactory, called '*The St. George's Ironworks*,' the Plaintiffs being able and willing, and hereby offering to sell and convey the whole thereof to the Defendants; and that due effect may be given to this declaration." The intention of the draughtsman, and of the Plaintiffs, whose wishes the draughtsman only expresses, was clear beyond all question. They could not have asked for the declaration prayed for by the original bill, unless they had at the same time, in conformity with the terms of the statute, expressed their willingness to sell the whole when required by the Defendants in exercise of their statutory power to do so. Then the bill prays for an injunction that they may be restrained from interfering with the Plaintiffs' possession without purchasing the whole. That was the state of things when the bill was filed, because at that time the notice of the 22nd of January had been served, by which the Defendants had expressed their intention of applying to the Board of Trade "for the appointment of a surveyor to determine the value of the hereditaments and premises required by the said notice to treat, and of the further lands and hereditaments which" the Plaintiffs "can lawfully require and have required the said committee to purchase and take, or of the interest therein which" the Plaintiffs "are entitled to or enabled to sell or convey." What is the meaning of that notice? It treats that question as an open question—not as the basis upon which alone an agreement can be entered into; there is no *consensus* of the parties, but the question is left open to be hereafter determined. By way of precaution, the Defendants, the railway company, say, "We will have the value ascertained of all —not only of that which we have required by our notice, but also

V.-C. B. 1874 GRIERSON v. CHESHIRE LINES COMMITTEE.

of that which you say we are bound to take; for if we are bound to take it—if we persist in our original notice" (I do not mean they say so, but I am paraphrasing what they say)—"to take that which we say is no part of the manufactory, and you succeed in establishing that it is part of the manufactory, and therefore fix on us the necessity of buying it all if we take any—we will have the value ascertained." There is nothing improper in that proceeding that I know of—nothing like entering into a contract to buy the whole; and while that question is pending between the parties, when it is raised upon this record, which is after the date of the notice I have mentioned, and when the Plaintiffs' demand is confined to their right to protection against the Defendants taking a part of this property unless they take the whole, the Defendants bethink themselves that they are in the wrong; they do not give up the question exactly, but they serve a notice by which they say they intend to withdraw from their original notice and their other notice. What more could the Plaintiffs, having regard to their bill as it was filed, desire?

Then it seems that the Plaintiffs are advised that the railway company by their conduct, and by the notice they had given, have fallen into a trap, and that the Plaintiffs can insist upon the purchase of the entirety. In my opinion, there is no foundation whatever for that; and if I were to decree specific performance in this case, it would be the first time that ever in this Court specific performance has been decreed against the plain meaning and intention of the parties to the supposed contract, or the real contract.

I think the Plaintiffs further, by amending their bill and turning it into a bill for specific performance, have asked for a great deal more than they are entitled to. The offer of the Defendants to withdraw and pay the costs up to that time does not free the case from the question which originally was raised by the Plaintiffs; because they were by law entitled to require the protection which could be given to them by a declaration of this Court. If the Defendants take any part of their land, they must take all—the Plaintiffs are entitled to a declaration to that effect, and the notice of the Defendants' withdrawing from their intention did not dispose of the question; because if it had been accepted and costs

paid, for aught I know, the Defendants might again have renewed that question. The Plaintiffs had a right to have that decided. If the Defendants by their notice had said, "We admit that you are in the right, we not only pay you the costs, but you shall take a decree containing that declaration now, which shall be your protection now and hereafter," there might be some question whether the case ought to have gone any further, or whether any costs after that offer should have been given against the Defendants. I find the notice defective in that respect. I cannot blame the Plaintiffs for bringing on their case to a hearing, that they may have, as I think they are entitled to have, a declaration in the terms of the original prayer: but that is the whole of the relief to which they are entitled, excepting only that the Defendants must pay the costs of this suit up to the hearing.

Upon the case of *Marson* v. *London, Chatham, and Dover Railway Company* (1), I intended to say a word. That case differs entirely from this in this respect: There, there had been a litigation disposed of by a decree, and no question was raised by the Defendants whether they were or were not bound to fulfil the contract. The decree having been in the terms in which it appears to have been made, there was no other mode on further consideration of dealing with the matter. The decree had settled that the Defendants were to be purchasers, they did not dispute it themselves, and thereupon the duty was incumbent upon them to do that which was necessary in order to give full effect to the decree, and that is all that the order on further consideration did.

The costs will include the costs of the motion for injunction.

Solicitors for the Plaintiffs: Mr. *J. Elliott Fox*, agent for Messrs. *Earle, Son, Orford, Earle, & Milne, Manchester.*

Solicitors for the Defendants: Messrs. *Cunliffe & Beaumont*, agents for Messrs. *Lingards & Newby, Manchester.*

(1) Law Rep. 6 Eq. 101; Ibid. 7 Eq. 546.

V.-C. B.
1874
Nov. 12.

BATLEY *v.* KYNOCK.

[1873 B. 178.]

Practice—Patent—Inspection.

An order will not be made on the application of the Plaintiff, in a suit to restrain an alleged infringement of his patent, for inspection of the Defendants' works and machinery unless the Court is satisfied that the inspection is essential to enable the Plaintiff to prove his case.

THIS was a motion on behalf of the Plaintiff for liberty to inspect the manufactory of the Defendants, and all cartridges therein, and to take specimens of any such cartridges (on payment of the full value of such specimens).

The bill was filed to restrain an alleged infringement by the Defendants, *G. Kynock* and *Kynock & Co., Limited*, of letters patent (as amended by disclaimer) granted in 1865 to *Joseph & F. J. Jones*, and now vested in the Plaintiff, for "Improvements in Cartridges for Breech-loading Firearms."

As described in the specification, the principal feature of the invention was the forming of the metal head of the cartridge case with a cup or chamber for the percussion cap, solid to or of a piece with the head by being struck up from it, as particularly described in and claimed by the said amended specification. Such a formation was by the bill alleged to have been a new invention as to the public use and exercise thereof before and at the time of the granting of the said letters patent, and a great improvement over all cartridges then in use.

The Defendants having contested the validity of the patent, and denied infringement, the following issues had been prepared for trial before the Court without a jury:—

1. Whether Messrs. *Jones* were the first and true inventors of the undisclaimed portions of the patent.

2. Novelty of invention.

3. Infringement.

The Plaintiff now applied for the direction of the Court as to the issues, and also for leave to inspect the Defendants' manufactory and all cartridges and machinery therein.

The Defendants, in an affidavit filed in opposition to the application for inspection, stated that they had made several improvements in their manufactory, a very large number of which had reference to apparatus whereby cartridges not in any way resembling those which the Plaintiff claimed to be protected by his alleged patent were made and prepared. Several of such improvements were in the machinery used by them for manufacturing the cartridges, the subject of the present suit. They objected to the Plaintiff being allowed to inspect their machinery, and see and examine their private improvements therein; and it was their belief that such inspection was not required for the purposes of the suit, but for the purpose of copying their improvements.

The Plaintiff had not met this statement by any evidence.

Mr. *Kay*, Q.C., and Mr. *Aston*, Q.C. (Mr. *Locock Webb* with them), for the Plaintiff:—

Upon the question of infringement, it is material to the Plaintiff's case that he should obtain evidence of the way in which the Defendants manufacture their cartridges, and as such evidence cannot be obtained without an inspection of the Defendants' premises and machinery, he is entitled to the order (*Kerr* on Injunctions (1)) in the terms adopted in *Davenport* v. *Jepson* (2).

Mr. *Swanston*, Q.C., and Mr. *Macrory* (Mr. *E. C. Willis* with them), for the Defendants:—

The order for inspection, being a very stringent order, will only be granted in cases of absolute necessity, where the Plaintiff has no other means of proving his case. No such necessity here exists, as the Plaintiff's patent is for improvements in cartridges and not for the machinery by which those improvements are effected, and he has only to buy our cartridges to satisfy himself upon the point. We object to the inspection asked for by the Plaintiff, as we have been developing our works for twelve years, and have spent £60,000 in building up and perfecting our machinery, and we shall be greatly damaged in our trade if the Plaintiff, who is a rival manufacturer, is allowed to inspect our

(1) Page 433. (2) 1 N. R. 308.

V.-C. B. 1874 BATLEY v. KYNOCK.

machinery and notice the methods by which many of our results are obtained.

Mr. *Kay*, in reply:—

Without inspecting the Defendants' works we cannot shew that they have been infringing our patent, as their cartridges cannot in themselves be distinguished from those of our manufacture. The mode in which we manufacture our cartridges is made an important part of our amended specification, which states that "our improvements relate to the manufacture of those cartridges which carry or contain their own means of ignition." In any case, there is no such rule as that the only case in which the Court grants inspection is where it is absolutely necessary for proof of the Plaintiff's case.

SIR JAMES BACON, V.C.:—

Upon the single point which is raised before me, there can be no doubt that the Plaintiff in such a suit as this is entitled to an inspection of the means which the Defendants employ in the manufacture of the articles alleged to be violations of the Plaintiff's patent when such inspection is essential for the purpose of enabling the Plaintiff to prove his case. Upon the materials before me that is not made out. There is no allegation by the Plaintiff that he cannot make out his case without inspection, but there is on the part of the Defendants a plain allegation that inspection is not necessary for the purposes of the suit. Upon that only I must decide this question. I would rather not go into the other matters which have been referred to—the description in the specification and the allegation in the bill—but as I read both the description in the specification and the allegation in the bill, I find that the charge made by the Plaintiff is that the cartridges, the right of manufacturing which is vested in him exclusively, have been imitated and copied by the Defendants, and if that fact can be made out the Plaintiff's case is clearly established. The mode of making that out is by examination of the cartridges; the means by which they have been made, whether by a machine, or a hammer, or a screw, cannot signify in the least if the cartridges of the Defendants, when made, are made upon the

principle of the patent claimed by the Plaintiff. I must take it, therefore, upon the evidence before me, that there is no allegation by the Plaintiff that the inspection is necessary for the purpose of his suit; and that it is alleged by the Defendants, and not contradicted, that no such necessity exists. I cannot, therefore, order the inspection. The costs to be costs in the cause.

V.-C. B. 1874 BATLEY v. KYNOCK.

Solicitors: Messrs. *Stibbard & Cronshey*, agents for Messrs. *Brook, Freeman, & Batley, Huddersfield;* Messrs. *Treherne & Wolferstan*, agents for Messrs. *Whately, Milward, & Co., Birmingham.*

RHYS *v.* DARE VALLEY RAILWAY COMPANY.

V.-C. B. 1874 Nov. 5.

[1873 R. 140.]

Railway Company—Compulsory Powers—Possession taken—Interest on Compensation Money.

Interest at 4 per cent. is payable by a railway company upon the purchase or compensation money from the time of their taking possession of the land under their statutory powers, and not merely from the subsequent period of ascertaining the price by the verdict of a jury.

IN August, 1864, the Plaintiffs *Rhys* and *Richards* were served by the *Dare Valley Railway Company* with notice to treat for lands, of which, with the minerals thereunder, they were lessees for a term of years, and in November, 1864, the railway company entered into possession of the lands comprised in the notice.

Differences having arisen between the parties with respect to the amount to be paid for compensation, the question was referred to arbitration. An umpire was, on the 12th of April, 1867, appointed by the Board of Trade (*Lands Clauses Act*, s. 28), and an award was made on the 29th of January, 1868. On the 9th of July, 1868, on motion by *Rhys* and *Richards* to set aside the award, on the ground of miscarriage by the umpire, an order was made by Vice-Chancellor *Giffard* remitting the matter back to the umpire to reconsider and redetermine the matters referred to him: *In re Dare Valley Railway Company* (1).

(1) Law Rep. 6 Eq. 429; Ibid. 4 Ch. 554.

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Further litigation took place to a considerable extent. *Rhys* and *Richards*, having taken steps to enforce their claim for compensation before a jury, a bill was filed by the railway company in February, 1869, to restrain them from taking any steps to obtain compensation except under the arbitration before the umpire. A demurrer to that bill was allowed with costs, on the ground that there being no valid award in existence, the landowners were not precluded from obtaining the verdict of a jury; and an appeal from this decision was dismissed by the Lord Chancellor on the 17th of March, 1869.

On the 20th of August, 1869, after further proceedings at law and in equity, *Rhys* and *Richards* obtained the verdict of a jury, assessing the amount of compensation at £2000; and in December, 1873, they filed the present bill to obtain specific performance of the agreement embodied in the notice to treat, and an account and payment of what was due to them for principal and interest in respect of the £2000 purchase or compensation money.

The only question raised was the date from which interest was payable by the company upon the £2000.

Mr. *Kay*, Q.C., and Mr. *Freeling*, for the Plaintiffs, contended that interest was payable from the time when the company took possession of the land, in 1864. The general rule that a purchaser taking possession of the estate and retaining the purchase-money must pay interest to the vendor, is well established: *Fludyer* v. *Cocker* (1); *Birch* v. *Joy* (2); even where it is provided that the purchase-money is not to be paid until a good title shall be made and executed: *Attorney-General* v. *Christ Church* (3).

Mr. *Cracknall* (Mr. *H. Matthews*, Q.C., with him), for the Defendant company:—

Mere possession of the land by the company gives no right to interest, and the Plaintiffs are not entitled to it from any earlier period than the verdict of the jury, when the price was ascertained and the relation of vendor and purchaser was first constituted: *Catling* v. *Great Northern Railway Company* (4).

(1) 12 Ves. 25.
(2) 3 H. L. C. 565.
(3) 13 Sim. 214.
(4) 18 W. R. 121.

SIR JAMES BACON, V.C.:—

The decision referred to on behalf of the company does not touch the plain rule of law which is established by the cases, especially by *Birch* v. *Joy* (1). The reason of the rule is perfectly plain. From the time when the railway company exercised their statutory rights and took possession of the land which belonged to the Plaintiffs they became owners of the land, and from that day the Plaintiffs became the owners of the price payable for the land. If I were to withhold payment of interest I should not only be going against the cases which have been cited, but I should be going against common sense, justice, and honesty. It would be in the power of any railway company to enter upon the land, and by resorting to litigation to postpone, by legal or other means, the settlement of the amount payable for compensation, while they all the time remained in possession of that property which was the vendor's. This would be most unreasonable, and it is quite clear, in my opinion, that from the time when the railway company exercised their compulsory powers and took possession of the Plaintiffs' land, they owed them £2000; and if they did not pay it they owe them the interest on that sum at 4 per cent. from the date of their taking possession.

Solicitors: Mr. *E. Peacopp*, agent for Mr. *Martin Scale, Neath;* Messrs. *Field, Roscoe, & Co.*, agents for Mr. *Benjamin Matthews, Cardiff.*

(1) 3 H. L. C. 565.

V.-C. H.
1874
Nov. 7.

JACKSON v. PEASE.

[1873 J. 35.]

Administration—Costs—Specific and Residuary Devise.

Where the residuary personalty, after payment of testator's debts, proved insufficient to pay the costs of a suit to administer the trusts of his will:—

Held, that the deficiency must be borne by the specifically bequeathed personalty, the specifically devised realty and the residuary realty, rateably according to value.

Bagot v. *Legge* (1) considered.

Lancefield v. *Iggulden* (2) not followed.

WILLIAM JACKSON, by his will, dated the 27th of March, 1872, having made a specific bequest and devise to his wife *Margaret*, devised and bequeathed to *M. Pease* and *Thomas Ryder* all other his real and personal estate upon the trusts therein declared (the Court holding that the trustees took the legal estate in the realty). He then gave various freeholds and leaseholds specifically to persons named in the will, and gave the residue of his real and personal estate to his wife, whom he appointed sole executrix. The testator died shortly after the date of his will, which was proved by his widow. She filed a bill against the trustees for the administration of the testator's estate, and for administering the trusts of his will. A decree was made in the suit directing several inquiries, and the Chief Clerk made his certificate, finding, *inter alia*, that there were no debts unpaid. The case now came on for further consideration, and the question arose as to how the costs of the suit were to be borne, inasmuch as the personal estate not specifically bequeathed was insufficient for the payment of the costs of the suit.

Mr. *Davey*, for the Plaintiff:—

The costs of administration must, it is submitted, be borne by the residuary personal estate, but in this case a great part of the costs have been occasioned by questions as to the real estate, and ought, therefore, to be borne by the devisees in exoneration of the

(1) 2 Dr. & Sm. 259. (2) Law Rep. 17 Eq. 356.

personal estate: *Bagot* v. *Legge* (1). At all events, if the residuary personal estate should be applied first in payment of costs, it would be insufficient, and there would be a deficiency, which ought to be borne rateably by the personalty and realty specifically devised, and the residuary realty: *Bagot* v. *Legge*; *Stead* v. *Hardaker* (2).

In those cases specifically devised and descended estates were held liable to contribute rateably, and the residuary realty was held only liable rateably with the other realty. A residuary devise, notwithstanding the *Wills Act*, remains specific: *Hensman* v. *Fryer* (3).

Mr. *John Cutler*, Mr. *Dunning*, Mr. *Fellows*, Mr. *W. C. Druce*, and Mr. *Millar*, for the several specific devisees:—

In accordance with the ordinary rule of the Court, the costs of the suit must be borne by the residuary personal estate so far as it will go, and then by the residuary realty, to make up the deficiency; but until these sources are exhausted, the specifically devised estates cannot be resorted to: *Lancefield* v. *Iggulden* (4); *Manning* v. *Spooner* (5); *Sanders* v. *Miller* (6); *Row* v. *Row* (7).

Mr. *Owen* appeared for the trustees.

Mr. *Nash*, and Mr. *Carson*, for persons who had been held not entitled.

SIR CHARLES HALL, V.C.:—

Notwithstanding the decision in *Bagot* v. *Legge*, I think that in this case the residuary personal estate must bear the costs so far as it will go. With regard to the mode of bearing the deficiency, the authorities are in an unsatisfactory state, and not easily reconcilable with one another. On this point I shall follow *Bagot* v. *Legge*, and not *Lancefield* v. *Iggulden*.

The residuary devise is specific, no alteration in this respect having been made by the *Wills Act* (1 Vict. c. 26). I must, there-

(1) 2 Dr. & Sm. 259. 10 Jur. N.S. 1093. (4) Law Rep. 17 Eq. 556.
(2) Law Rep. 15 Eq. 175. (5) 3 Ves. 114.
(3) Ibid. 3 Ch. 420. (6) 25 Beav. 154.
(7) Law Rep. 7 Eq. 414.

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fore, hold that the specifically bequeathed personalty, the specifically devised realty, and the residuary devised realty, must contribute rateably to make up the deficiency.

Solicitors for the Plaintiff: Messrs. *Bischoff, Bompas, & Bischoff.*

Solicitors for the Defendants: Messrs. *Pitman & Lane;* Mr. *P. B. Matthews.*

V.-C. H. 1874 *Nov.* 4, 5, 16.

LYLE *v.* ELLWOOD.

[1871 L. 82.]

Presumed Marriage—Divided Repute—Preponderance of Evidence—Conduct of Witnesses.

A marriage may be established by preponderating repute and by conduct, even though the repute be divided.

ON the death of one *Mary Prosper*, who died on the 15th of February, 1870, intestate, letters of administration were taken out by the Plaintiffs, grandchildren of *John Ellwood* (the paternal grandfather of the intestate), as her next of kin, and shortly afterwards they filed a bill to administer her estate against *James* and *John Ellwood*, who claimed to be sons of *John Ellwood*, the grandfather, by a marriage with *Sarah Campbell*, and therefore nearer of kin than the Plaintiffs. By a decree in the cause made on the 10th of June, 1871, the usual accounts and inquiries were directed, and, *inter alia*, one for the purpose of ascertaining who were the next of kin of the intestate. In the prosecution of this inquiry the question was raised, whether *John Ellwood*, the grandfather, was the lawful husband of *Sarah Campbell.*

John Ellwood, sen., who was by trade a butcher, and a miner, in 1770 married *Mary Gibson*, at *Whitehaven*, by whom he had seven children, of whom three died in infancy. Those who survived were *Thomas* (the father of the intestate), *Mary*, who married one *Spittall*, *Elizabeth*, who married one *Thompson*, and *Gibson* (the father of one of the Plaintiffs), who was born in the year 1786.

In 1792 *John Ellwood*, sen., with his wife and his three children,

Mary, *Elizabeth*, and *Gibson*, removed to *Glasgow* (*Thomas* having previously settled in *Wales*). In 1794 Mrs. *Ellwood* died at *Glasgow*. For about two years after his wife's death *John Ellwood* moved from place to place in *Scotland;* but in 1796 he took up his abode at the *Bridge of Weir*, in *Renfrewshire*. When he arrived at the *Bridge of Weir* he was accompanied by *Sarah Campbell*. He remained at the *Bridge of Weir* for fifteen years, carrying on the business of a butcher and toll-bar keeper, and during the whole of that period *Sarah Campbell* resided with him as his wife, and bore several children. The evidence of several aged witnesses proved that while they resided at the *Bridge of Weir*, *John* and *Sarah* always passed as man and wife, and that *Sarah* was always addressed as Mrs. *Ellwood*, and by an entry in the registry of births and baptisms *Sarah* was described as the "spouse" of *John Ellwood*, sen., and *John* and *Campbell Ellwood*, two sons, were described as the children of *John* and *Sarah Ellwood*. In 1811 *John Ellwood* and *Sarah Campbell* returned to *England*, leaving *Mary Spittall*, *Elizabeth Thompson*, and *Gibson Ellwood*, *John Ellwood's* children by his first marriage, in *Scotland*, but bringing with them the children of *Sarah*. In this year *James Ellwood*, a son of *Sarah*, was born, and a certificate of his baptism was produced, in which he was described as "son of *John Ellwood* and *Sarah* his wife, late *Campbell*."

Shortly afterwards *John Ellwood*, sen., and *Sarah Campbell* settled at *Long Marton*, in *Westmorland*, where they remained till the death of *John Ellwood*, which took place in 1829.

Evidence was given by various persons residing in or near *Long Marton* during this period, that *John Ellwood*, sen., and *Sarah Campbell* lived together as man and wife, and that the latter was always addressed by the neighbours as Mrs. *Ellwood*, or Mrs. *Sarah Ellwood*.

About three years after the death of *John Ellwood*, sen., *i.e.*, in or about the year 1829, the Defendants *John* and *James Ellwood*, the children of *Sarah*, who had got into difficulties, left *Long Marton*. They first visited *Thomas Ellwood*, the eldest son of *John Ellwood*, sen., by *Mary Gibson*, and asked him to assist them, which however he refused to do. They then paid a visit to *Gibson Ellwood* in *Scotland*, and during their stay there stopped

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for a short time, variously stated at a few days and two or three weeks, at the house of *Elizabeth Thompson*. Shortly after this visit *John* and *James Ellwood* emigrated to *America*.

Between the date of the death of *John Ellwood*, sen., in 1829, and the death of *Sarah Campbell*, which took place in 1844, letters were written to *Sarah Campbell* by *Gibson Ellwood*. These letters were addressed to *Sarah Campbell* as Mrs. *Sarah Ellwood*, and in them *Sarah Campbell* is spoken of throughout as "mother," and the writer signs himself "your loving son *Gibson Ellwood*." In these letters, also, the Defendants *John* and *James Ellwood* are spoken of affectionately, and are repeatedly referred to as the writer's brothers. *Sarah Campbell* was at this time living at the house of one *Joseph Goodburn*, who had married *Christina*, one of her daughters by *John Ellwood*, sen. In a letter of *Gibson Ellwood* to *Joseph Goodburn*, *Joseph Goodburn* is addressed as brother, and *Sarah Campbell* is again spoken of as mother.

In the entry of the burial of *Sarah Campbell* in the Register of Burials for the parish of *Long Marton*, in the year 1844, *Sarah Campbell* was referred to as *Sarah Ellwood*.

In the year 1850, *Thomas Ellwood* died. Some stress was laid by the Plaintiffs upon the fact that though his will carefully provided for *Gibson Ellwood* and the children of his sisters *Elizabeth Thompson* and *Mary Spittall*, who were both then dead, no benefits whatever were conferred upon the Defendants *John* and *James Ellwood*.

About the year 1851, *Gibson Ellwood* went to *America*. During his residence there, which lasted till his death, in 1863, some correspondence took place between him and *John* and *James Ellwood*, with whom he seems to have been on intimate and friendly terms. In this correspondence *Gibson Ellwood* addresses them as his brothers. This was sought to be explained by the circumstance that *Gibson Ellwood* had been brought up with *Sarah Campbell's* children, and had been accustomed to regard her as his mother.

In the year 1859, a cousin of *John Ellwood*, sen., one *John Ellwood*, of *Dufton*, died. By his will he bequeathed a portion of his residuary estate among the brothers and sisters of *Gibson Ellwood*, or the children of such of them as should be dead at the date of his death. In the distribution of this estate a question was

raised whether the Defendants were, as half-brothers of *Gibson Ellwood*, entitled to a share with his full brothers and sisters as the children of *John Ellwood*, sen. Considerable correspondence took place between the several parties interested upon this subject, and the opinion of counsel was taken as to the right of the children of the half-blood to a share. In this correspondence no question was raised with respect to the legitimacy of the Defendants, and it was assumed that if the difficulty as to children of the half-blood could be got over, the Defendants would be entitled to a share as a matter of course. Among the documents relied upon by the Defendants upon this subject were letters written to *John* and *James Ellwood* by the Plaintiffs *Francessa Orr Lyle* and *Elizabeth Mackenzie*, daughters of *Gibson Ellwood* (both of whom now sought to dispute the marriage between *John Ellwood*, sen., and *Sarah Campbell*), in which the Defendants were addressed as uncles, and the whole tenor of which shewed that the writers looked upon them as their own relations. A sworn statement of *Gibson Ellwood*, in which he deposed to the fact that after his own mother's death his father, *John Ellwood*, sen., married *Sarah Campbell*, which statement seemed to have been made with the object of accelerating the distribution of the *Dufton* estate, was also relied on on behalf of *John* and *James Ellwood*. This statement was made by *Gibson Ellwood* shortly before his death, which took place in the year 1863.

Against this evidence of the general repute of a marriage between *John Ellwood*, sen., and *Sarah Campbell*, and of the recognition of such a marriage by the members of the family, there were affidavits by the Plaintiff *Francessa Orr Lyle*, *Mary Caldwell*, a daughter of *Elizabeth Thompson*, and the Plaintiff *Elizabeth Mackenzie*, and *Ann Drysdale*, daughters of *Gibson Ellwood*. It was alleged in these affidavits that, with the exception of *Gibson Ellwood*, who had been brought up by *Sarah Campbell*, and had an affection for her, no member of the family kept up any communication with her or treated her as the lawful wife of *John Ellwood*, sen. The deponents stated that they had often heard from their parents, and it was well known in the family generally, that *John Ellwood*, sen., and *Sarah Campbell* were never married, and evidence was given of many conversations among members of the

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family having taken place which would have no meaning except on the supposition that the family believed the Defendants to be illegitimate. It was owing to the personal affection of *Gibson Ellwood* for the Defendants that the question of their legitimacy or illegitimacy was not raised on the occasion of the division of the *Dufton* estate. It was further stated that *Thomas Ellwood* was in the habit of giving Christmas presents of money to his brothers and sisters, but that the Defendants were never included in his bounty. Reference was also made to a receipt given by *Sarah Campbell* to *Thomas Ellwood* for a sum of £5 which *Thomas Ellwood* had sent to her after the death of *John Ellwood*, sen. This money, it was stated, was paid by *Thomas Ellwood* expressly in remuneration for *Sarah Campbell's* services as housekeeper, and not as a gift to her as his brother's wife. It was also stated that the receipt was signed "*Sarah Campbell.*" The receipt, however, was not produced, nor, in fact, was any documentary evidence of importance forthcoming in support of the case of the Plaintiffs. The belief of the deponents against the marriage was rested partly upon the information received from their parents and other members of the family, and partly upon a record of family events alleged to be contained in a family Bible which had belonged to *John Ellwood*, sen., and which was stated to record the marriage of *John Ellwood* and *Mary Gibson*, and the births and deaths of their children, but to contain no reference to a marriage with *Sarah Campbell* or to the children of *John Ellwood*, sen., by her. This Bible, however, was not produced, and such of the allegations of the deponents as seemed to be based on its contents were rejected as inadmissible.

With respect to the use of the words "spouse" and "children" in the entries of the births of the Defendants *John Ellwood* and *Campbell Ellwood*, an affidavit of Dr. *McLaren*, master of the *Renfrew Grammar School*, was put in in support of the Plaintiffs' case, stating that the use of such words in entries prior to 1855 (the date at which registration was made compulsory in *Scotland*) was inconclusive, the entries being made, in the absence of express knowledge, in the terms of information supplied by the person wishing the entry.

In the argument the question was treated as one in no way depending upon Scotch law, and no question was therefore raised

as to the domicil of the parties. It was admitted that no direct proof could be given of any marriage having been solemnized between *John Ellwood*, sen., and *Sarah Campbell*, and the only question was whether, in the face of evidence of opinion against the fact of marriage, a valid marriage was established by habit and repute.

The Chief Clerk by his certificate left the question for the decision of the Court.

The case now came on for further consideration.

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the Plaintiffs:—

It is true that in this case a great deal of evidence has been adduced to shew that *John* and *Sarah* were reputed to be man and wife, and if that had been uncontradicted, it might have been sufficient: but repute to be sufficient must be undivided repute, inasmuch as divided repute is no evidence at all: *Cunningham* v. *Cunningham* (1).

Mr. *Fraser*, in his book on domestic relations, lays down the proposition as follows: Repute must not be divided. It has been held by some that the repute need not be absolutely universal; it was said to be enough if it be decidedly preponderating in favour of the marriage, and not so equivocal as that the friends of one of the parties never heard of it; but this has been overruled by other authorities, which hold that if the repute be divided, it is no repute at all. In *Goodman* v. *Goodman* (2) a marriage was established, though there was some evidence of divided repute; but the conflict of testimony there arose from religious dissensions in the family.

In this case the only real evidence in favour of a marriage is the cohabitation; but that of itself is insufficient to establish a marriage so as to make the children legitimate. On these grounds it is submitted that the Plaintiffs must be held the nearest of kin of the intestate.

Mr. *C. C. Tucker*, for parties in the same interest as the Plaintiffs.

Mr. *Fry*, Q.C., and Mr. *F. O. Haynes*, for the Defendants:—

A marriage may be established by reputation alone: *Doe* d.

(1) 2 Dow. 482. (2) 28 L. J. (Ch.) 745.

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Fleming (1); *St. Devereux* v. *Much Dewchurch* (2). In this case the evidence is all one way. It has been proved that *John* and *Sarah* lived together many years as man and wife, and that she was always received by his friends as his wife, and that he always treated her as such. Acknowledgment of marriage for eighteen years has been held sufficient to establish a marriage even *inter vivos*: *Hervey* v. *Hervey* (3).

In the Register for Births and Baptisms for the parish of *Houston* and *Killelan*, *John Ellwood* and a child named *Campbell* were described as the children of *John Ellwood* and *Sarah*, his spouse.

[Mr. *Dickinson*, Q.C., for the Plaintiffs, objected to this evidence being admitted, on the ground that the book itself would not be admissible, inasmuch as the officer who made it was authorized to make an entry of baptisms, and not of births (4), in the course of his duty. This entry was made before the 17 & 18 Vict. c. 80 was passed, which made registration compulsory in *Scotland*.

The VICE-CHANCELLOR:—I am bound to reject this evidence.]

Then look at the acts of the parties. *John Gibson*, from whom the witnesses who now oppose the Defendants' claim profess to have derived their information that there was no marriage, himself made an affidavit in which he swore that there was. But even if there had been no marriage in the first instance, a connection which began improperly may be presumed to terminate in a marriage. In the *Breadalbane Case* (5) it was held that a connection commencing in adultery may become matrimonial by consent, and be evidenced by habit and repute. On these grounds it is submitted that this marriage has been established.

Nov. 16. SIR CHARLES HALL, V.C.:—

The question I have to determine is whether it is proved that *John Ellwood* and *Sarah Campbell* became man and wife. That they cohabited as, and were by many persons reputed to be, man and wife, is deposed to by several witnesses—this evidence relating as well to the time when they resided at *Bridge of Weir*, in

(1) 4 Bing. 266.
(2) 1 Sir Wm. Bl. 367.
(3) 2 Ibid. 877.
(4) Dixon's Law of Evidence, Scot. vol. ii. c. 8, p. 672.
(5) Law Rep. 1 H. L., Sc. 182.

Scotland, as to the time of their residence in *England* after they had left *Scotland* and come to reside in *England*. In answer to this evidence, there are affidavits by persons whose interest it is to defeat the claim of those supporting a marriage, which affidavits seek to make out that there was a repute in the family that *John* and *Sarah* were not man and wife, *i.e.*, that their cohabitation was illicit. Some of these opposing affidavits represent that *John Gibson Ellwood*, called *Gibson Ellwood*, the youngest child of *John Ellwood*, by the wife to whom he was married before he lived with *Sarah*, considered and represented that there had never been a marriage. It is to be observed, however, that *John Gibson Ellwood's* acts and conduct were altogether at variance with his considering that there had not been a marriage. He wrote to *Sarah*, addressing her as his mother, and subscribing himself as her son, and describing two of her children, *John* and *James*, as his brothers. He also wrote to two of her children, addressing them as his brothers, and his correspondence is in many other respects only consistent with the view that he considered that *John* and *Sarah* were husband and wife. Others of these affidavits mention that other members of the family considered that there was no marriage; but it is to be observed that the deponents in these affidavits, or those representing them, have acted upon a different view. In 1859, another *John Ellwood*, a member of the family, died, having made a will whereby he gave some real estate to *John Gibson Ellwood*, and gave his residuary estate to a class, including the brothers and sisters of *John Gibson Ellwood*, and the children of such as might be dead. It thus became necessary to ascertain what lawful children *John Ellwood* had. To ascertain this there was an inquiry which occupied a considerable time. Two of the deponents, who now assert that *John Gibson Ellwood* believed that there was not a marriage, viz., Mrs. *Mackenzie* and Mrs. *Lyle*, or Mr. *Lyle*, her husband, took part in reference to this distribution of the testator's estate. There was much correspondence upon the subject. Mrs. *Mackenzie* wrote to *John* and *James* as her brothers. Mrs. *Lyle's* solicitor wrote to Mr. *Robinson*, one of the executors of the testator. It is not immaterial that Mr. *Robinson* was himself a solicitor. All the correspondence treats the children of *Sarah* as legitimate, and therefore entitled to share under the will of the

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testator. The testator's estate was distributed upon that footing. It has been contended that, having regard to the affidavits in opposition to the marriage, the case is one of divided repute, and that being so, a marriage is not proved. As to this, reference was made to what was said by Lords *Eldon* and *Redesdale* in *Cunningham* v. *Cunningham* (1). It is not necessary for me to say how the case would have stood had it rested upon the evidence exclusive of that relating to and connected with the distribution of the estate of the testator, *John Ellwood*. It appears to me that evidence of repute that there was not a marriage is outweighed by other evidence supporting it, distribution of that estate taking place as it did with the concurrence and against the interests of two of four persons now seeking to make out repute in the family that there was not a marriage, and with the concurrence and against the interest of *John Gibson Ellwood*, the father, of two other of the persons supporting the same view, such two persons taking part in the distribution, and *John Gibson Ellwood*, who is alleged to have asserted that there was not a marriage, having made an affidavit in order to bring about a distribution of the estate on the footing of the children of *Sarah* being legitimate.

It cannot, I think, be contended that wherever there is evidence of repute on one side and on the other a marriage cannot be established. In *Hervey* v. *Hervey* (2) a marriage was established upon reputation only, notwithstanding the husband had denied the marriage, he having joined with the lady in levying fines; and there is a somewhat similar case mentioned by the late Mr. *Hubback* in his work on Succession (3), where there was evidence that the woman was never looked on by the family as married, but the man having covenanted to bar the (alleged) wife's freebench the marriage was established. *Goodman* v. *Goodman* (4) is also a case of the Courts establishing a marriage by reason of the acts of the parties, although there was some evidence of family repute adverse to the existence of a marriage. It appears to me that the Court can and should in the present case receive and act upon the evidence to which I have referred, as answering and outweighing the evidence that there was a repute

(1) 2 Dow. 482.
(2) 2 Sir Wm. Bl. 877.
(3) Page 255.
(4) 28 L. J. (Ch.) 745.

that there had not been a marriage. I hold, therefore, that a marriage is proved to have taken place, acting upon the law as laid down in *Doe* d. *Fleming* v. *Fleming* (1), and many other cases. In *Hoggan* v. *Craigie* (2) Lord *Cottenham* thus states the law: "It is not necessary to prove the contract itself, it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; upon this principle the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage." I desire also to refer to Lord *Cranworth's* statement of the law in the *Breadalbane Case* (3). He there says: "The great facility which the law of *Scotland* affords for contracting marriage has given rise to rules and principles which have been sometimes considered peculiar to that law. By the law of *England*, and, I presume, of all other Christian countries, where a man and a woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a *primâ facie* presumption that they really are and have been what they profess to be. If after their deaths a succession should open to their children, any one claiming a share in such succession as a child would establish a good *primâ facie* case by shewing that his parents had always passed in society as man and wife, and that the claimant had always passed as their child. If the validity of the parents' marriage should be disputed, it might become necessary for the person claiming as their child to establish its validity, and, inasmuch as in *England* all marriages are solemnized in public, and publicly recorded, it is reasonable to require the claimant to give positive evidence of its celebration, or else to explain why he is unable to do so. The principle is the same in *Scotland;* but as marriage there is not necessarily celebrated in public, or recorded, it is much more probable than it would be in *England* that there may have been a marriage, but that there may be no means of giving direct proof of it. Those who have to decide, after the death of parents, on the legitimacy of children, must, much oftener than in *England*, have to rely solely on the *primâ facie* evidence afforded by the conduct of the parties towards one another, and of

(1) 4 Bing. 266.
(2) Macl. & Rob. 942, 965.
(3) Law Rep. 1 H. L., Sc. 182, 199.

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their friends and neighbours towards them. This sort of evidence is spoken of in *Scotland* as *habite* and *repute*. Persons are sometimes said to be married persons by *habite* and *repute*.

In the present case there may well have been a marriage by agreement only when the parties were in *Scotland*. My opinion is in no way dependent upon the certificates of the births of *John* and *James Campbell*. Whether these certificates were rejected or not, my conclusion would have been the same. The certificate of *James's* baptism in 1811, in which he is described as son of *John Ellwood* and *Sarah* his wife, late *Campbell*, was admitted without objection; nor should I have taken a different view had I admitted the evidence tendered to prove a certain receipt by *Sarah Campbell* to *Thomas Ellwood*.

Solicitors for the Plaintiff: Messrs. *G. A. Crawley & Arnold.*
Solicitor for the Defendants: Mr. *J. T. Marshall.*

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HAMER *v.* SHARP.

[1874 H. 55.]

Vendor and Purchaser—Principal and Agent—Instructions to procure a Purchaser of an Estate—Estate Agent—Authority—Specific Performance.

Upon a written request by an owner of freehold property to an estate agent to procure a purchaser for it and to advertise it at a certain price:—
Held, that the estate agent had no authority to enter into an open contract for sale, and, *semble*, that he had no authority to enter into any contract for sale.

THE Defendant, *Jeremiah Sharp*, on the 17th of October, 1872, called upon *C. Longbottom*, an estate agent at *Bradford*, and gave him written instructions in the following form:—

"I request you to procure a purchaser for the following freehold property, and to insert particulars of the same in your *Monthly Estate Circular* till further notice, viz., my beer house and shop, No. 4 and No. 6, *Manchester Road*. Tenant, No. 4, *William Galloway*, gilder; and No. 6, *Albert Vaults*, *Henry Holmes*, beer retailer, and work-rooms above. Present net rent, £150;

price £2800, when I will pay you a commission and expenses of fifty pounds. About six years' lease unexpired.

"(Signed) *J. Sharp.*"

Longbottom inserted in his *Estate Circular*, which he published every month, a full description of the messuages as being for sale by him, and otherwise advertised the same for sale, and he continued so to do at regular intervals down to the date of the following acknowledgment and receipt:—

"*Bradford*, Jan. 31, 1874. I hereby acknowledge having this day paid the sum of two hundred and eighty pounds on account of the purchase of Mr. *Jeremiah Sharp's* freehold property situated at the bottom of *Manchester Road, Bradford*, in the county of *York*, and numbered 4 and 6, now in the occupation of Mr. *Hammond*, brewer, and others, or his or their under-tenants, at the price of two thousand eight hundred pounds, free from all incumbrances, but subject to the present leases granted to the tenants or some of them. The vendor to supply an abstract of the title held by him, and should the same be found defective the vendor shall have the option to cancel the contract on returning the deposit money without interest or expenses, or to make good the defect; and I agree to pay the balance of purchase-money, two thousand five hundred and twenty pounds, on the 31st day of March next, when the purchase is to be completed.

"(Signed) *John Hamer.*"

"*Bradford*, January 31st, 1874. Received this day of Mr. *John Hamer* the sum of two hundred and eighty pounds on account of purchase of Mr. *Jeremiah Sharp's* freehold property, Nos. 4 and 6, *Manchester Road*, at the price of two thousand eight hundred pounds, on the terms of acknowledgment signed this day.

"(Signed) *C. Longbottom*,
"For *Jeremiah Sharp.*"

The allegation in the bill was that on the 31st of January, 1874, *Longbottom* had full authority to enter into a contract, and to sign the last-stated memorandum of that date as the agent of the Defendant, and that it was in all respects a good, valid, and binding contract on the Defendant; and the Plaintiff prayed that

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the Defendant might be decreed specifically to perform the contract, and also be ordered to deduce a good title and to pay the costs of the suit.

The Defendant admitted in his answer that he was entitled to the property in fee simple, subject, however, to a mortgage; that he did, in October, 1872, in writing, request *Longbottom* to find him a purchaser, and to insert the particulars of the property in his *Estate Circular;* and stated that he told him to try it for six months, and if he did not find a purchaser within that time he would keep the property until the leases expired, and that *Longbottom* said that he would bring or send to him any person who was likely to buy. Further, that about the expiration of the six months he told *Longbottom* not to advertise the property in his *Estate Circular* and that he would keep it until the leases expired. The Defendant also stated that he did not appoint *Longbottom* his agent for the purpose of selling the property, nor authorize him to enter into any contract of sale on his behalf. He admitted that *Longbottom* did continue to insert an advertisement of the property in his *Estate Circular* after he had told him to discontinue doing so; and he alleged that if at any time *Longbottom* was authorized to sign a contract on his behalf, which he submitted was not the case, yet that such authority had been revoked long before the date of the alleged contract of the 31st of January, 1874. On Friday, the 30th of January, 1874, the Defendant received a paper writing, which was left at his house in his absence, in the following form:—

"Folio 2102. *Bradford Estate Offices, Britannia Buildings, Market Street,*

"To Mr. *Sharp.* "Jany. 29th, 1874.

"Please permit Mr. *Hamer* to view your property, Nos. 4 and 6, *Manchester Road,* price £2800, should he apply to you.

"And oblige,

"*C. Longbottom.*

"Early information of any change will oblige."

Mr. *Hamer* did not apply to the Defendant to view the property, but he did to one of the tenants, and was told that the property was not for sale. On Saturday, the 31st of January, 1874, *Long-*

bottom wrote to the Defendant informing him that he had sold the property, in accordance with his instructions, that morning, and received a deposit of 10 per cent., which he would be glad to pay on Monday. The Defendant called upon *Longbottom* on Monday, the 2nd of February, and told him he had no right or authority to sell the property, and that he declined to recognise the alleged contract as binding on him. A correspondence ensued between the parties and their solicitors, and as the Defendant persisted in his determination not to recognise the contract this bill was filed to enforce its performance. The deposit money, less the £50, and a small sum alleged to be due, was on the 5th of March sent by *Longbottom* to the Defendant, who received it on the 6th, the day on which this bill was filed, and it was on the same day paid into a bank on deposit, and notice thereof sent to *Longbottom*, to the Plaintiff, and to his solicitor.

Mr. *Longbottom*, in his affidavit, submitted that he had full authority to sell the property, and denied the statements of the Defendant in reference to the limitation of six months, and that he would keep the property until the leases expired.

Mr. *Lindley*, Q.C., and Mr. *Edward P. C. Hanson*, for the Plaintiff, submitted that the instructions given by the Defendant in October, 1872, were sufficient authority to Mr. *Longbottom* to enter into the contract of January, 1874; that, upon the evidence, there was no revocation of the authority, and that the contract ought to be decreed to be specifically performed. They referred to the case of *Ireland* v. *Livingston* (1).

Mr. *Greene*, Q.C., and Mr. *Dunning*, for the Defendant, submitted that Mr. *Longbottom* was merely instructed to find a purchaser, and that he had no authority to sell the property; and that if he ever had any it was revoked long prior to January, 1874. Also, that the agent could not give a receipt for the purchase-money, nor for the deposit-money; nor fix the amount of the deposit-money.

Mr. *Lindley* was heard in reply on the construction of the written request of October, 1872, and contended that the prin-

(1) Law Rep. 5 H. L. 395.

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ciple laid down in *Ireland* v. *Livingston* (1) was applicable to this case.

SIR CHARLES HALL, V.C.:—

The question in this case is one of very considerable importance in reference to the disposal of landed estate generally. The question is whether, when an owner of an estate puts it into the hands of an estate agent for sale, stating a price for and giving particulars of the property to enable him to inform intending purchasers, but giving no instructions as to the absolute disposal, and none as to the title of the property, and mentioning none of those special stipulations which it might be proper to insert in conditions in reference to the title, that is sufficient authority to the agent to sign a contract for the sale of the property for the price stated in the instructions, without making any provision whatsoever as to title. In considering whether the instructions of October, 1872, were a sufficient authority to the agent for that purpose, I cannot help expressing an opinion that such an authority to an agent on the part of a vendor would be highly imprudent, as the purchaser would then be entitled to require, on completion, attested copies of all documents of title, and the expense of them would swallow up, to a great extent, the purchase-money. This estate agent must have known that if this property had been offered for sale by public auction there would have been conditions to guard the vendor against being subject to certain expenses, and to prevent the contract becoming abortive by reason of a purchaser requiring a strictly marketable title. Could he suppose that he was invested with authority to sign a contract without considering what it should contain as regards title? As an intelligent and well-informed person, he could not suppose that he was properly discharging his duty to his principal when he signed the contract which he signed: such a contract was not one within the scope of his authority to sign. If he had a right to enter into any contract at all, it was one of a different description, and on that ground alone—this being a bill for specific performance, and the Court having a discretion—I hold that the alleged

(1) Law Rep. 5 H. L. 395.

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contract, if it be a contract, is not one which the Court will decree to be carried into effect.

Taking that view of the case, it is not necessary for me to decide the question of authority, but I nevertheless state my opinion to be, that when instructions are given to an agent to find a purchaser of landed property, he, not being instructed as to the conditions to be inserted in the contract as to title, is not authorized to sign a contract on the part of the vendor. This contract being based upon the instructions given by the document of October, 1872, I hold that it is not a case for decreeing specific performance, and, consequently, the bill must be dismissed with costs.

Solicitors: Messrs. *Paterson, Snow, & Burney*, agents for Mr. *J. Cater, Bradford, Yorkshire;* Messrs. *Clarke & Son*, agents for Messrs. *Terry & Robinson, Bradford, Yorkshire.*

ARNOLD *v.* DIXON.

V.-C. H. 1874 Nov. 22.

[1870 A. 106.]

Real Estate—Decree for Sale—Conversion—Sale under Decree.

Where, in an administration suit asking also for partition of real estate, the Court directed a sale, but before it was effected one of the parties interested in the real estate died:—

Held, that the estate was sufficiently converted, and the estate having been sold, the share of the deceased beneficiary passed to his legal personal representative.

Steed v. *Preece* (1) followed.

THE bill in this suit was filed for the administration of the estates of *Margaret* and *Sarah Dixon*, sisters, deceased, and for a partition of the real estate of which they had been seised in equal moieties. The suit came on to be heard in 1871, when the Court, being of opinion that a sale would be more beneficial, directed a sale, which was effected in July, 1873, and the proceeds paid into Court. Between the date of the decree and the sale, *H. G. Dixon*, one of the parties entitled to share in the real estate ordered to be sold,

(1) Law Rep. 18 Eq. 192.

V.-C. H. 1874 ARNOLD v. DIXON.

died intestate, leaving his brother, *R. L. Dixon*, his heir-at-law, and his said brother and his sister, *Margaret Ripley*, his next of kin. Administration of his estate was granted to his brother, *R. L. Dixon*.

A question was now raised whether *Ralph L. Dixon* took the share in his own right, or as legal personal representative of his brother.

The VICE-CHANCELLOR asked if there was not authority on the question, stating that he thought the question had been recently considered. The case thereupon stood over for counsel to look into the cases.

Mr. *Pemberton*, for *Margaret Ripley* and the trustees of her settlement, afterwards cited the case of *Steed* v. *Preece* (1), which he submitted was precisely in point.

Mr. *Tremlett*, for the heir-at-law, contended that that case did not govern the present. In that case the estate had been actually sold before the death, but here it was otherwise.

Mr. *Brodrick*, and Mr. *Wilkinson*, appeared for other parties.

SIR CHARLES HALL, V.C.:—

I do not think that case and the present should be considered to be distinguishable so that a different conclusion should be come to. I do not say what I should have held in the absence of the decision in that case, but in so saying I do not mean to be considered as doubting the correctness of that decision. I think I should follow, and I do follow, *Steed* v. *Preece*, as being applicable to the case now before the Court. Payment of *H. G. Dixon's* share must be directed to *Ralph L. Dixon*, as legal personal representative of his brother.

Solicitors: Messrs. *G. A. Crawley & Arnold*; Messrs. *Bell & Brodrick*.

(1) Law Rep. 18 Eq. 192.

CROMPTON *v.* LEA.

V.-C. H.
1874
Nov. 4, 25.

[1874 C. 225.]

Demurrer—Mine—Injunction—Irreparable Injury—Use of Property—Negligence—Water.

A bill averred that a mine which the Defendants threatened to work could not be worked without letting in a river and flooding Defendants' mine, and through that the Plaintiff's mine, and prayed an injunction.

Demurrer overruled.

2 App Cas 785
6 CLD 719
12 CLD 217

DEMURRER.

The material allegations of the bill were as follows:—

"1. The River *Douglas* is a natural watercourse of considerable volume flowing through the town of *Wigan*, and is liable to heavy floods. In its course through *Wigan* it flows over the outcrop of two seams of coal known as the *Wigan Five-feet Mine* and the *Wigan Four-feet Mine*. The outcrop of the *Wigan Four-feet Mine* intersects the River *Douglas* at the north-west corner of a field hereinafter referred to as *Eccles' Field*, in *Wigan*, which field and the mines thereunder belong to and are in the possession of the Defendants.

"2. The outcrop of the *Wigan Five-feet Mine* intersects the said river at a point about 200 yards higher up the stream.

"3. The Plaintiff is the lessee of large portions of the said *Wigan Five-feet Mine* and *Wigan Four-feet Mine*, and also of a lower seam of coal called the *Wigan Nine-feet Mine*, all which seams he is now engaged in working. The dip of the seams and of the containing strata is such that the Plaintiff's mines are lower than the same mines under *Eccles' Field*, and the flow of water would be from Defendants' towards the Plaintiff's mines.

"4. Both the *Four-feet Mine*, which is four feet six inches in thickness, and the *Five-feet Mine*, which is four feet in thickness, were extensively worked many years ago close up to the outcrop. The workings in the *Four-feet Mine* vary in depth from the surface in *Eccles' Field* from six feet to six or seven yards, and at the point where the outcrop of the said mine intersects the River *Douglas* the workings approach within a distance of six feet from the bed of the stream. The roof in the said workings was left supported

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by narrow pillars of coal, so that the said mines are honeycombed in all directions, the surface resting on slender pillars. The precise date at which these old workings near the outcrop were made, and their exact dialling, cannot now be ascertained, but it is certain that they communicate with all the workings in the said three seams belonging to the Plaintiff.

"5. Owing to the insufficient support by the said pillars, the surface, both in *Eccles' Field* and at the outcrop of the *Five-feet Mine* higher up the stream, has more than once given way on the occasion of heavy floods." The bill then specified two occasions when the flood ultimately filled all the workings in the five-feet, four-feet, and nine-feet seams, and burst the walls of the shafts of the *Ince Hall Colliery*, of which Messrs. *Whaley & Gerard* were lessees, rushed down the shafts to the workings in the seam with such force and fury, that the surface of the earth trembled at the pit top. On this occasion six miners and many horses were drowned.

"6. Part of the mines formerly worked by Messrs. *Whaley & Gerard* so flooded as above, was leased to them by a predecessor in title of the lessor of the Plaintiff, Messrs. *Whaley & Gerard* occupying such portions of the *Wigan Five-feet Mine* and the *Wigan Four-feet Mine* under the lessor's lands as were within a depth of 200 yards from the surface. The Plaintiff has a lease of and is working those portions of the said mines under the same lands which are below that depth, and of the whole of the *Wigan Nine-feet Mine* thereunder, the lease to Messrs. *Whaley & Gerard* having expired many years ago. The workings of the Plaintiff commence directly with those left by Messrs. *Whaley & Gerard.* All the intervening parts of the said *Wigan Five-feet* and *Wigan Four-feet Mines* have long been worked out, with the exception of the pillars left for the support of the surface, and there is complete communication between the Plaintiff's said mines and the old workings under *Eccles' Field.*

"7. Shortly after the inundation a joint arrangement was entered into by the owners of the several collieries aforesaid to repair the breaches, and do what was necessary for mutual protection. After obtaining the consent of Messrs. *Eccles,* the then owners of *Eccles' Field* aforesaid, and of Messrs. *Heron & Whitaker,*

the proprietors of the fields higher up the stream where the water broke in, the owners secured the roof of the old workings by building pillars, and by timbering and otherwise. They also filled up the holes with earth, leaving, as stipulated by the proprietors, a walled pit or entrance into the old workings, the head of the pit being elevated a few feet above the surrounding surface. They also put dams into some drifts between their colliery workings and the old workings, and it was supposed that those dams cut off all communication between the present workings and the river. However, a short time afterwards the river again burst through into the five-feet seam at the same place as before, but the dam proved ineffectual, and the water again completely filled the *Bullock's Colliery*, and a large portion of the *Holme House* workings, and caused considerable damage to property.

"8. In 1857, 1860, and 1872, the River *Douglas* again broke into the old workings of the five-feet and four-feet seams at the same places.

"9. In the *Eccles' Field*, the scene of those disasters, the Defendants have, within the last few weeks, commenced sinking two shafts for the purpose of winning and working the mines of coal under and adjacent thereto."

10. The bill then stated that under the *Eccles' Field* lay the following mines:—"The *Four-feet Mine*, twelve feet below the surface; the *Nine-feet Mine*, eighty-one feet below the last-mentioned mine, and seven and a half feet thick; the *Cannel Mine*, 200 feet below the *Nine-feet Mine*; the *King Coal*, 300 feet below the *Cannel*; the *Ravine Mine*, 120 feet below the *Cannel*, and six feet thick; the *Yard Coal*, 112 feet below the *Ravine*, and three feet thick; the *Bone Coal*, 102 feet, the *Smith Coal*, 225 feet, and the *Arley Mine*, 420 feet below the *Yard Coal*.

"11. In the actual condition of the workings in the *Four-feet* and *Five-feet Mines*, any operations that cause a movement or disturbance in the strata below those mines will necessarily and inevitably cause the pillars in the old workings to give way, and the surface, and with it the river-bed, will fall in. The water of the river, instead of flowing in its accustomed channel, will then flow into the hollows in the Defendants' said fields, and thence into the Plaintiff's mines.

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"12. In consequence of the short distance between the *Four-feet Mine* and the *Nine-feet Mine*, it is absolutely impossible by any known method of working to work the latter mine without dislocating and disturbing the superincumbent strata, and bringing down the pillars in the *Four-feet Mine*. The same result will also inevitably be produced in any of the following events, that is to say: If the *Cannel Mine* is worked otherwise than by leaving at least one half of the coal ungotten as and for pillars evenly distributed throughout the mine for the support of the superincumbent strata. If any portion of the *King Coal* is worked, and if the *Ravine Mine*, or any of the lower mines, be worked without leaving at least one half of each of these respective mines ungotten as and for pillars, evenly distributed throughout the said mines for the support of the superincumbent strata.

"13. In truth, the only legitimate use to which the upper seams of coal in *Eccles' Field*, aforesaid, can be put is to serve as a pillar for the support of the river bed and the adjacent surface, and the manner in which these upper seams have been worked, has made it impossible further to work them for any mining purpose. The same considerations apply to the fields adjoining *Eccles' Fields*.

"14. Since 1847 the workings under the principal *Wigan* coal fields have been enormously developed, and there is intercommunication among them all, and where there is a barrier it is too slight to resist the pressure that would arise from letting the river into any part of the coal fields.

"15. On the 27th of July, 1874, Mr. *Peace*, the solicitor, for several master coal miners whose mines are endangered by the Defendants' acts, wrote to the Defendants a letter calling their attention to the danger that would result from their working the mines under the property in *Wigan*, lately belonging to Mr. *Eccles*, alongside the River *Douglas*. The letter inclosed an extract from the report of Mr. *Dickinson*, Her Majesty's Inspector of Coal Mines for 1851, and having warned the Defendants of the danger of their proceedings, intimated that unless they received a satisfactory answer, they must take proceedings to protect themselves.

"16. Notwithstanding this letter, the Defendants persist in their determination to work the said seams, and are continuing

to sink and make shafts in *Eccles' Field*. The shafts are made without adequate protection at the surface against the overflowing of the *Douglas*, and are insufficient to keep out the water in the event of any flooding of the hollows in the *Four-feet Mine*. The Defendants also threaten and intend to work all the coal mines under and near to the field. To do so will inevitably bring down the pillars in the old workings in the four-feet and five-feet seams, and will thereby cause the bed of the *Douglas* to break in, and through the fissures and holes thus made the river will flow into the old workings in all the collieries in the said coal field. The lives of a great number of men will be jeopardized, and immense and irretrievable damage will be done to the Plaintiff's property.

"17. The Plaintiff charges that sinking the said shafts and working the said mines in the manner threatened, will occasion an unjustifiable trespass on the Plaintiff's property, irreparable and incapable of being compensated in damages, and which ought to be restrained by injunction.

"18. The Defendants have only recently acquired their property, which they did acquire with a full knowledge of the facts above stated, and especially that the old workings in the *Four-feet* and *Five-feet Mines* respectively communicate underground with the Plaintiff's several collieries."

The bill then prayed that the Defendants might be restrained from permitting the said shafts in *Eccles' Field* to remain without a wall or dams sufficient to resist and keep out the overflow of the *Douglas*, and from continuing the said shafts through any mine of coal or pervious stratum without protection or tubing, or without making the lining of sufficient strength to prevent water flowing from the hollows of the four-feet seam down the shaft to the lower mines; 2, also from disturbing any coal or pillars in the *Wigan Four-feet Mine* under or near *Eccles' Field*; 3, from working the coal in the *Wigan Nine-feet Mine* under or near *Eccles' Field* aforesaid; 4, from working the *Cannel Mine* under *Eccles' Field* otherwise than by leaving at least one half of the mine ungotten as and for pillars evenly distributed throughout the mine for the support of the roof and the superincumbent strata; 5, from working the *King Coal* under or near *Eccles' Field*, as aforesaid;

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6, from working the *Ravine Mine*, or any mine below it, under or below *Eccles' Field*, otherwise than by leaving half of the coal of each ungotten, to serve for pillars to support the roof; 7, and from doing any acts causing the *Douglas* to flow into any of the old workings of the *Wigan Four-feet or Five-feet Mines*.

Mr. *Dickinson*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Clare*, for the demurrer:—

The Plaintiff's mine is on the dip and the Defendants' on the rise, and both cannot be worked. Upon the allegations of this bill, the Plaintiff is seeking to prevent the Defendants from working their mine without any averment that they are working it negligently or improperly. What in effect he says is this: I want to work my mine to the utmost, but I cannot because you are doing the same thing. It is well settled that unless a man is doing something that he has contracted not to do, or something that is unlawful, or in its nature wrong, or something negligently where he ought to exercise care, he cannot be restrained from exercising his right to the utmost whatever may be the consequence of his act to others: *Chasemore* v. *Richards* (1). In that case a landowner sunk a well on his own land which withdrew the water from a mill where there had been a sixty-years' user. But it is said there are other cases in which the contrary has been held, where a man makes an artificial reservoir, and banks it up artificially, in which case he is bound to protect his neighbour from the consequences; but that is not this case, and is more like *Rylands* v. *Fletcher* (2). Another case is where a man may complain of water being abstracted; neither is that this case. Then there is the case of improper working; but that is not alleged in this case. It is the right of each of the owners of adjoining mines to work as they please though injury may accrue, provided it be not done negligently or of malice: *Smith* v. *Kenrick* (3). That case governs the present. In *Smith* v. *Fletcher* (4), which was peculiar, the decision below was reversed on appeal, and a new trial directed with a view to ascertain whether there had been negligence on the part of the Defendant in working his mine, but in the present case no

(1) 7 H. L. C. 349; 2 H. & N. 168.
(2) Law Rep. 3 H. L. 330.
(3) 7 C. B. 515.
(4) Law Rep. 9 Ex. 64.

(1 SC 5 Jur NS 873; 5 L 985

negligence is alleged in the bill, and must be assumed on this demurrer to be absent, and therefore *Smith* v. *Fletcher* (1) is precisely in point. This bill is really filed to compel the Defendants to protect the Plaintiff's mine from injury, but it is for the Plaintiff to do that himself: *Baird* v. *Williamson* (2). So in *Dunn* v. *Birmingham Canal Company* (3) it was held that the Defendants were not responsible for damage to the Plaintiff's mines, there being no proof of negligence or acts done *ultrà vires*. The Plaintiff's case in effect is this, that he has worked out his own mine, and now complains that if the Defendants do the same thing it will be injurious to him, unless the Defendants do something for his protection; but that the Defendants are not bound to do. The case of *Rylands* v. *Fletcher* (4) really governs this case. The head-note in that case is, that "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages." If that be the law this demurrer must be allowed.

Mr. *Fry*, Q.C., Mr. *Herschell*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Finch*, for the Plaintiff:—

This demurrer is bad. The bill alleges that unless the Defendants be restrained from doing the acts complained of, irretrievable damage to property, and perhaps to life, will result from their operations; and that is of itself an equity sufficient to maintain this bill: *Robinson* v. *Lord Byron* (5); *Crowder* v. *Tinkler* (6); *Hepburn* v. *Lordan* (7); *Haines* v. *Taylor* (8). It is contended for the demurrer in effect, first, that there is on this bill no allegation of negligence; secondly, that it appears from the bill that the Plaintiff or his predecessors in title have done acts but for which the injury he apprehends could not have arisen; thirdly, that it appears on the face of the bill that the Plaintiff can protect himself against the injury he fears, and which the Defendants contend he ought to do. The Plaintiff admits that he has no remedy

(1) Law Rep. 9 Ex. 64.
(2) 15 C. B. (N.S.) 376.
(3) Law Rep. 7 Q. B. 244.
(4) Ibid. 3 H. L. 330.
(5) 1 Bro. C. C. 588.
(6) 19 Ves. 617.
(7) 2 H. & M. 345.
(8) 2 Ph. 209.

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against the natural flow of the water into his mine, but what he says is, that the Defendants are working their mine for no legitimate purpose, and that the effect of such working will be to divert the river into the Defendants' mine, whence it will flow into and flood Plaintiff's mine. The case of *Rylands* v. *Fletcher* (1) is conclusive in the Plaintiff's favour, because it lays down this principle, that if one man brings on his own land something calculated to injure his neighbour, he is bound to see that his neighbour is protected from damage: *Crowder* v. *Tinkler* (2). That case was approved and explained by Vice-Chancellor *Kindersley* in the case of *Soltau* v. *De Held* (3). The case of *Hepburn* v. *Lordan* (4) answers the argument as to contributory negligence. The essence of the Plaintiff's case is, that the Defendants are going to do what they know will cause irreparable injury, and the Defendants contend boldly that they have a right to do so. They contend that the only persons who have a right to complain are the riparian owners, but that proposition cannot be maintained. Suppose a bank on the surface were removed by the owner, so as to let the water flood land lower down not the property of a riparian owner, a right of action would clearly arise: *Ruck* v. *Williams* (5); *Smith* v. *Fletcher* (6).

Mr. *Dickinson*, in reply:—

What is negligence? It is not an abstraction; it is an omission to fulfil a duty, having regard to the particular circumstances of each case; but here it is not the duty of the upper mine-owner to protect the lower mine from the natural flow of water. It is the duty of the owner of the servient mine to protect himself. No such negligence is alleged on this bill. The result of the cases seems to be as follows: First, where there are mutual obligations among the mine-owners *inter se*, the rule is that the owner of the upper mine must work his mine so as not to damage the lower mine, and the owner of the lower mine must protect himself from the natural consequences of his neighbour's legitimate working. Secondly, where the owner of the upper mine lawfully lets into it

(1) 3 H. & C. 774; Law Rep. 1 Ex. 265. 11 Jur (N.S.) 746. 12 L.T. 603
(2) 19 Ves. 617.
(3) 2 Sim. (N.S.) 133, 159.
(4) 2 H. & M. 345. 11 Jur 1015 12
(5) 3 H. & N. 308.
(6) Law Rep. 9 Ex. 64.

water, but improperly suffers the water so let into it to accumulate in one spot, so that by reason of the accumulation damage may accrue to the lower mine, the onus is shifted, and the owner of such lower mine is entitled to be protected against such injury. Thirdly, if the owner of the upper mine works it legitimately, and in the course of that proper working water naturally flows into it, he is not liable to the owner of the lower mine, even though the water may flow from a natural stream which such proper working has opened. Lastly, this is not the case of a nuisance. [Mr. *Dickinson* then entered into a minute analysis of the case of *Rylands* v. *Fletcher* (1), and contended that it was wholly in the Plaintiff's favour, when the Lord Chancellor's judgment was read with attention. He submitted, therefore, that the demurrer must be allowed.]

SIR CHARLES HALL, V.C.:—

This is a case of considerable importance to the parties, and to other owners of mines. The case has been very ably argued on both sides; and if I thought that by further consideration I should be likely to come to a different view, I should certainly have deferred giving my judgment upon it. The question being one of some novelty, and as I have said of importance, and there being a motion for an injunction pending on the result of the hearing of this demurrer, I think I ought not to delay stating my view of the case.

The Plaintiff is the lessee of certain mines described in the bill, which lie in the dip of certain mines which are owned by the Defendants. In that state of things, of course the natural water to be found in the mine of the Defendants would flow into the mine of the Plaintiff; and in the ordinary working of the mines of the Defendants, the Plaintiff would be subject to that inconvenience. He cannot complain of that. Like every other mine-owner on the dip, he takes subject to the common enemy, the water, finding its way into his mine in the ordinary course of gravitation, in the common working of mines. He could only protect himself against that, if he could protect himself at all, and

(1) Law Rep. 3 H. L. 330.

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probably he could, by leaving a barrier to prevent the water coming into his mine. He was not bound to leave a barrier. Each of the owners is entitled by law to get out the whole of the mineral from his mine, leaving the water to take its own course. The Plaintiff says, and that is his case, that although I cannot complain of the water flowing to my mine from your, the Defendants', mine, in ordinary course, I have a right to complain of this —I have a right to complain that you are now about to get mineral out of your, the Defendants', mine, so near to a river which flows over that mine, that the consequence of your workings will be that that river will flow into your, the Defendants', mine, and thence flow into my mine; and it is the Plaintiff's contention that if the act had been done and injury occasioned, he would be entitled to maintain an action against the Defendants: the question to be tried on this demurrer is whether such an action would lie. If the action would lie, then the injury must be prevented if the case be one for the exercise of the jurisdiction of this Court by means of injunction.

There seems to be no authority which entirely covers the case; but in considering the case I must attend to what the statements of the bill are, in reference to the position of the Defendants' mines and what remains to be got of those mines. The upper mines or seams of coal seem to be three,—the *Five-feet Mine*, the *Wigan Four-feet Mine*, and the *Wigan Nine-feet Mine*. Then there are a number of mines which lie at a very great distance from these much deeper down. In the 4th paragraph of the bill the *Four-feet Mine* and the *Five-feet Mine* are stated to have been extensively worked many years ago when the workings were carried almost close up to the outcrop. "The workings in the *Four-feet Mine* vary in their depths from the surface in *Eccles' Field* aforesaid from six feet to six or seven yards, and at the point where the outcrop of the said mine intersects the River *Douglas* the workings approach within a distance of six feet from the bed of the stream. The roof in the said workings was left supported by narrow pillars of coal so that the said mines are honeycombed in all directions, the surface resting on slender pillars." The bill states that the Plaintiff does not know exactly when that took place. Then, referring to certain breakings in of

the water, the statement in the 9th paragraph of the bill is that the Defendants have recently commenced sinking two shafts for the purpose of winning and working, what I collect from that paragraph when taken in connection with other passages in the bill, to be all the mines. There is a description given of what these mines are in the next paragraph. Then it is stated in the 11th paragraph: "That in the actual condition of the workings in the *Four-feet* and *Five-feet Mines* any operations that cause a movement or disturbance in the strata below those mines will necessarily and inevitably cause the pillars in the old workings to give way, and the surface, and with it the river bed, will fall in. The water of the river, instead of flowing on in its accustomed channel, will then flow into the hollows in the Defendants' said field and thence into the Plaintiff's mines." Then paragraph 12 states: "In consequence of the short distance between the *Four-feet Mine* and the *Nine-feet Mine* it is absolutely impossible by any known method of mining to work the latter mine without dislocating and disturbing the superincumbent strata and bringing down the pillars in the *Four-feet Mine*. The same result will also inevitably ensue in any of the following events (that is to say)." The other statements have reference to the lower mines; and in paragraph 13 it is said: "In truth, the only legitimate use to which the upper seams of coal, *Eccles' Field* aforesaid, can be put is to serve as a pillar for the support of the river bed and the adjacent surface, and the manner in which these upper seams have been worked has made it impossible further to work them for any mining purpose. The same considerations apply to the fields adjoining *Eccles' Field*."

If I understand that paragraph to be a statement of fact, which I do, and not wholly or in part the conclusion of law to be derived from the preceding statements, we have there an averment that these upper mines of the Defendants cannot be worked further; that it is impossible to work them further for any mining purposes. Therefore, if that be so, what is alleged as regards the Defendants is, that they are proposing to do something which will not result in a mining operation at all for their own advantage or profit, that they will get no benefit from it whatever. That being so, it is stated in the 16th paragraph of the bill that "The Defendants also threaten and intend to work all the said coal mines under and

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near to the said fields. To do so will inevitably bring down the pillars in the old workings in the four-feet and five-feet seams, and will thereby cause the bed of the River *Douglas* to crack and break in, and through the fissures and holes thus made the whole of the water in the river will flow into the old workings, and thence into all the collieries in the said coal field."

That is the case made by the bill, and in substance I understand it to be this: You, the Defendants, having these upper mines of yours, or at least two out of the three having been very extensively worked in former times, pillars having been left for the support of the surface, are now proposing to recommence mining operations in those mines; you are proposing to further get minerals out of those, but your doing so, having regard to the previous mining, cannot be of any use whatever having regard to the former workings, and what you propose to do will necessarily result in this—that the bed of the river will immediately fall in, and this flowing stream, which is now existing as a flowing stream, will immediately be precipitated into this mine of the Defendants, and thence into the mine of the Plaintiff. The Defendants say that in that state of things they are entitled to do what will produce that result, and the question is, whether they are entitled to do so in point of law. The cases which have been referred to, or rather certainly the general principle applicable to the case as stated in *Smith* v. *Kenrick* (1), and cases of that sort, are very simple and well settled and clear. As I have said before, the party who has got the mine in the dip must take the risk of the water flowing when the mining operation is going on in a regular way. Every one has a right to use his land or mine and make the most of it, subject ordinarily to the rule that he must use his property so as not to injure his neighbour. Ordinarily he is bound to take care that nothing wanders from his property on to his neighbour's so as to injure him. But in applying that qualification of the ordinary rule, it is well settled that the case of underground water flowing from ordinary and proper mining operations does not come within it, and, therefore, the lower proprietor must take subject to that risk. That is what cases like *Smith* v. *Kenrick* decide. On the other hand, *Baird* v. *Williamson* (2) is an

(1) 7 C. B. 515. (2) 15 C. B. (N.S.) 376.

example of a case of a different kind, where it is said, If you do work you must only work in the ordinary, proper, and skilful way, and must not accumulate a mass of water and then throw that water in a mass upon the proprietor whose mine is lower down; you are not entitled to do that. In respect of that an action will lie. Then the question is, whether an action will lie, taking the facts and statements of this bill as they are alleged, if the bed of this stream were tapped under the circumstances stated in the bill, because it is said the Defendants are going to tap this water, not for any proper mining purpose of their own, because it would do them no good, inasmuch as the result of the working would be of no benefit to the Defendants: that they would not derive any benefit from it is the statement. It is alleged by the Plaintiff that the Defendants have no right to do that which is not an ordinary mining operation in working of minerals and allowing the ordinary water to percolate and gravitate down into the lower mine, whether it be water which is collected during the mining operations, or which from some preceding mining operations may have been collected. Each party has claimed the benefit of the judgment in *Rylands* v. *Fletcher* (1); and Mr. *Dickinson*, in his very able criticisms on that judgment, has said the Lord Chancellor in that case drew the distinction between the use of the close and the use of the water, and that he there refers to the accumulation of water either on the surface or underground; and he says it would be an idle distinction to make between a mass of water on the surface, accumulated there, and water not stationary but flowing, and only a mass of water differing from an ordinary reservoir in that it is flowing water. But the Lord Chancellor's judgment in *Rylands* v. *Fletcher* must be read and understood with reference to the case before him. His observations were not directed, nor did he mean to say anything, as I understand the judgment, in reference to what would be the law if a man were to tap a river which was flowing over the surface of the mine, and thereby inundate all the proprietors below. I do not see, as Mr. *Herschell* submitted on this point, why a mine-owner who is lower down should be in a worse position or less entitled to complain of an injury occurring to him from such an act, such a throwing down

(1) Law Rep. 3 H. L. 330.

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of the water upon him, than a riparian proprietor, or one who is not immediately a riparian proprietor, or one considerably inland. If any injury should accrue in consequence of the interference with the flow of a river in that way, I do not see why any person who sustains an injury in consequence of that which must be a wrong to somebody—for at all events it must be a wrong to somebody—is in a worse position than other persons who would have an undoubted remedy. I do not consider that the observations of the Lord Chancellor in *Rylands* v. *Fletcher* are, in fact, in favour of the Defendants in this case. I take the rule to be as stated in the judgment of Mr. Justice *Blackburn*, which is stated in *Rylands* v. *Fletcher* (1): "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there) harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this

(1) Law Rep. 3 H. L. 339.

we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches;" and the Lord Chancellor says, "In that opinion I must say I entirely concur." It is said, however, on behalf of the Defendants here, that within the meaning of the law as there laid down, what is alleged in this bill as being the consequence of the Defendants' acts, is not within the letter or reason of this view and those opinions—that is to say, it is said the Defendants will not, within the meaning of that judgment, be bringing the water upon the mine. I say that will be bringing the water on their own mine, and that they will not bring it the less because they do not desire it to come, I must take to be the fact upon the statements on this bill that it will be the inevitable consequence of what they propose to do. Is it less a case in which an action will lie, because it is merely the inevitable consequence of their act, than it would be, if for some purpose of their own, *e.g.*, for the purpose of working the mine and making use of the water, they brought the water into their mine. Moreover, in this particular case they do it apparently not for any legitimate mining purposes whatever, because, according to the statements in the bill, their working the three seams cannot result in any real advantage. It also appears to me that the observations in *Smith* v. *Fletcher* (1) are important, because in that case the Chief Justice, Lord *Coleridge*, says, in reference to the new trials, that it was desirable "that the opinion of the jury should be taken, as to whether what was done by the Defendants was done in the ordinary, reasonable, and proper mode of working the mines." It being essential, apparently, according to that, that it should be an ordinary, reasonable, and proper working of the mine, I cannot, upon the statements of this bill, say that the Defendants are proceeding to do that which can be so described, namely, an ordinary, reasonable, and proper mode of working these three seams of coal. I say that it appears to me just the reverse, and that the Defendants are doing something without any good, proper, or reasonable object; and applying the law as I consider I find it in *Rylands* v. *Fletcher* (2) and *Smith* v. *Fletcher*, it appears to me it is impossible for me to say there is not in this bill something stated entitling the Plaintiff to some relief.

(1) Law Rep. 9 Ex. 64. (2) Law Rep. 3 H. L. 330.

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Another branch of the argument has been that it is the Plaintiff's own fault that this water will find itself there, because he might have left a barrier, and that he has partly worked out his mine. But he had a perfect right to work his mine partially or wholly, and to work it up to the very margin of his neighbour's mine. The Defendants' mine is not actually the adjoining mine, nor was it in the case of *Rylands* v. *Fletcher* (1), but for this purpose it may be treated as the same. Therefore, that is no answer to the case, nor is it any answer to say that, supposing neither mine had been worked at all, the Plaintiff would have had no ground to complain. If neither mine had been worked, he might have gone on and got his mine out, and the water would not have found its way into his mine. If, on the working of the Defendants' mine, the workings had come so far as to let the water flow into the Plaintiff's mine before it was completely worked out, then he would, I think, have had a case. Upon the whole, it appears to me that the Plaintiff's bill is one which he is entitled to have answered, and I must overrule the demurrer.

Solicitors for the Plaintiff: Messrs. *Sharpe, Parkers, Pritchard, & Sharpe.*

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) Law Rep. 3 H. L. 330.

Ex parte BOLLAND. *In re* HOLDEN.

C. J. B.
1874
Nov. 9.

Summons for Examination—Service—High Bailiff of County Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 96—*Bankruptcy Rules*, 1870, *rr.* 58, 166, 167, 171.

The Judge of a County Court has a discretion to direct whether a summons for examination under sect. 96 of the *Bankruptcy Act*, 1869, shall be served by the solicitor of the person applying for it, or by the High Bailiff of the Court.

THIS was an appeal from a decision of one of the Judges of the *Liverpool* County Court.

The trustee under the bankruptcy of *John Holden* desired to summon for examination, under sect. 96 of the *Bankruptcy Act*, 1869, two persons whom he suspected to have possessed themselves of part of the bankrupt's estate. The trustee's solicitors applied to the Registrar for summonses for this purpose, and also for leave to serve the summonses when issued. This leave was asked for because by a recent order made by the Registrar it was directed that all such summonses should be served by the High Bailiff of the Court. Till this order was made, it had been the practice that such a summons should be served by the solicitor of the party applying for it. The application for leave to serve was made in order to raise the question of the regularity of this change in the practice. The Registrar refused to give leave to serve the summons, and the matter was brought before the Judge. The Judge was of opinion that, under Rule 58 of the *Bankruptcy Rules*, 1870, the summons could only be served by the High Bailiff, and he affirmed the decision of the Registrar, embodying in his order an expression of his opinion as to the construction of Rule 58. The trustee appealed.

Mr. *Channell* (Mr. *Herschell*, Q.C., with him), for the Appellant:—

The Judge thought that, by virtue of Rules 58, 166, and 167, the High Bailiff alone is entitled to serve a summons under

C. J. B. 1874 *Ex parte* BOLLAND. *In re* HOLDEN.

sect. 96 of the Act (1). We say that the effect of Rule 167 is to permit or direct a summons to be served otherwise than by the High Bailiff, especially having regard to the fact that in the Queen's Printers' copy of the Rules, sect. 96 of the Act (among others) is referred to in the margin opposite Rules 166 and 167. So also in the *Bankruptcy Forms*, 1870, there is a reference in the margin of form No. 76, "Summons under sect. 96 in a County Court," to Rule 166, from which it may be inferred that the word "subpœna" in Rules 166 and 167 was meant to include a summons under sect. 96. It would be the most convenient course, and would tend to save expense, that a summons of this kind should be served by the solicitor who applies for it, as he would be the person best able to ascertain by inquiry whether he had got hold of the person who could give the information which it was desired to obtain, and he would also know whether his witnesses would be forthcoming when they were wanted.

Mr. *De Gex*, Q.C., and Mr. *J. Beaumont*, for the High Bailiff, were not called on.

(1) Sect. 96 provides: "The Court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property."

Rule 58 provides: "Unless otherwise directed or permitted by these Rules, it shall be the duty of a high bailiff to serve all orders, summonses, petitions, and notices."

Rule 166: "A subpœna for the attendance of a witness capable of giving evidence concerning any matter in the Court, before or after adjudication, shall be issued by the Court at the instance of a trustee, a creditor, a debtor, or any respondent in any matter, with or without a clause requiring the production of books, deeds, papers, and writings in his possession or control, and in such subpœna the name of only one witness shall be inserted. A subpœna may be issued in blank, as at common law."

Rule 167: "A sealed copy of the subpœna shall be served personally on the witness by the person at whose instance the same is issued, or by his attorney, or by an officer of the Court, within a reasonable time before the time of the return thereof."

SIR JAMES BACON, C.J. :—

I can do nothing but dismiss this appeal. The Judge, to whom a discretion as to this matter of procedure in his own Court is committed by the Legislature, is of opinion that it would be more for the public benefit that a public officer in whom he can place confidence should be intrusted with the service of this kind of process, rather than that it should travel about into other hands. I cannot interfere with the exercise of that discretion. Looking at the words of Rule 58, I think it is purely a question of discretion whether the Court will intrust the service to its own officer or not. The importance of having the process of the Court properly served must strike everyone. The argument that the solicitor would know best who was the person who could give the information required is of no weight, especially having regard to Rule 171, which says that every application to the Court under sect. 96 shall be in writing, and shall state clearly the grounds upon which it is made. I have no doubt that the Judge could, if he thought fit, direct the service to be made by the solicitor. But, in my opinion, he was at perfect liberty to deal with the case as he did, having regard to the Rules, and seeing that there might be very good reasons why the service should be made by the High Bailiff. I think there is no ground whatever, either in the Rules or in the nature of this case, for complaining of the order. The appeal must be dismissed, and the costs must be paid by the Appellant personally, not out of the estate of the bankrupt.

Solicitors for the Appellant: Messrs. *Girling & Owles*, agents for Messrs. *Barrell & Rodway, Liverpool.*

Solicitors for the Respondent: Messrs. *Learoyd & Co.*

M. R.

1874

June 23, 30; *July* 1, 6, 7, 8, 13, 14, 15, 20, 21, 22, 27, 28, 29; *Aug.* 3, 4; *Nov.* 4, 5, 6, 9, 10, 24.

COMMISSIONERS OF SEWERS *v.* GLASSE.

[1871 L. 127.]

Waste of Forest—Right of Common Appurtenant—Suit against Lord of Manor by Owners and Occupiers of Land—Common of Vicinage—Inclosure—Injunction.

In a suit by the owners and occupiers of lands in *Epping Forest* against the lords of the several manors within the forest, claiming to be entitled, in right of and as appurtenant to their several lands and tenements, to common of pasture for cattle, levant and couchant, on their respective tenements over all the waste lands of the forest, and praying an injunction to restrain the inclosure of any part of the said waste:—

Held, on the evidence in the case, that such right had been established; that the Defendants had failed to shew that the right of common was only common of vicinage; that the other grounds of defence wholly failed; and that any further inclosure of the waste must be restrained.

Where *A.*, *B.*, and *C.* are three vills with commons, *B.* lying between *A.* and *C.*, there can be common of vicinage between *A.* and *B.* and between *B.* and *C.*, but not between *A.* and *C.*; and, *semble*, there cannot be common of vicinage between more than two townships.

THE Plaintiffs in this suit were seised of a farm within the boundaries of the *Forest of Essex*, of which in part they were occupiers. The bill, as amended, was filed on behalf of themselves and all other the owners and occupiers of lands and tenements lying within the *Forest of Essex*, other than the waste lands of the said forest, except such of them as were Defendants, or were in the bill alleged to be sufficiently represented by the Defendants, or some of them.

The bill stated that the *Forest of Essex*, commonly called *Waltham Forest* or *Epping Forest*, was situated in the county of *Essex*, and contained a large tract of waste and inclosed lands, including the whole of the several manors of *Aldersbrook*, *Wanstead*, with *Stonehall*, *Cann Hall*, *Ruskholts*, *Woodford*, *Leyton*, *Grange*, *Walthamstow Toney*, or *Hill Hall*, *Highams*, *Chingford*, *Earls Chingford*, *St. Paul Chigwell*, and *West Hatch Sewardstone*, *Waltham Holy Cross*, *Loughton*, and *Epping*, otherwise *Epping Bury*, and parts of the manors of *West Ham* and *Thoydon Bois*; that the *Forest of Hainault* was formerly part of the *Forest of Essex*, and

was some time since disafforested by Act of Parliament; and that the *Forest of Essex* had been from time immemorial, and still was, except as to the *Forest of Hainault*, a royal forest.

The bill alleged that the Defendants *William Bulkeley Glasse* and *Andrew Alfred Collyer-Bristow* were lords of the manor of *Aldersbrook*, and of the several manors of *Wanstead*, with *Stonehall*, *Woodford*, and *Ruskholts*. The bill contained similar allegations concerning the other Defendants, except the Attorney-General, that they were respectively lords of the other manors mentioned in the bill and included in the forest.

The bill alleged that the whole of the inclosed, as well as the waste lands within the forest had been from very ancient times subject to rights reserved by the Crown on the grants of the several manors and lands lying within the forest, for enabling the Crown to maintain the forest as a royal forest for hunting, and subject also to the ancient forest laws made from time to time for enforcing and regulating those rights; and that the Crown so reserved, and had from time immemorial claimed and exercised for those purposes, an absolute right of disposition over the deer and certain other wild animals within the forest under the name of venison; and over the woods, underwoods, and coverts, under the name of vert; and over the pasture, turf, gravel, and soil of the waste lands in the forest:

That the government of the forest was formerly administered by the Lord Warden of the Forest and other subordinate officers, and that the forest laws were executed by the Forest Courts, which consisted of the Court of the Chief Justice in Eyre, the Swanimote Court, and the Court of Attachments, or Forty-Day Court, of which two last-mentioned Courts four verderers, elected by the freeholders of *Essex*, ought to be the Judges. That the jurisdiction of these Courts embraced all matters touching the preservation of the rights of the Crown in the forest, to which rights the manorial, common, and other rights within the limits of the forest were subordinate. That the offices of Lord Warden of the Forest, and of Chief Justice in Eyre had been abolished, and that the powers belonging to those offices were vested in the First Commissioner of Woods and Forests, who, however, had not exercised, and refused to exercise, the same: that there had for

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many years been only one surviving verderer, and that a writ had lately been issued for the election of three others to fill up the vacancies, and that three persons had been declared elected, but that the election of two of them was informal and void:

That the owners of lands within the bounds of the forest were restricted by the forest laws from the full use and enjoyment of their lands, and, amongst other things, were prohibited from inclosing their lands with fences above a certain height, or made so as to impede the free passage of wild animals through the forest, and were subject to various burdensome restrictions:

That the forest laws also forbade the inclosure of any of the waste lands within the forest, and the erection of any fences or obstructions thereon; and that the lords of the manors within the forest were not, nor ever were, able of their own authority, or merely by the consent of the homages of their respective manors, to inclose any part of the waste lands of their respective manors lying within the forest, nor could any such inclosure lawfully be made in prejudice of the rights and privileges existing within the forest, or without a license under the authority formerly vested in the Chief Justice in Eyre granted upon the certificate of two or more of the verderers, and subject to the proviso that the inclosures thereby authorized be not prejudicial to the forest or to the rights of the Crown in vert and venison:

That owners of lands and tenements within the royal forests, and particularly within the said forest, by virtue of ancient forest laws made by the Crown in exercise and derogation of its said forest rights, and recognised and confirmed by divers statutes of the realm, had, from very ancient times, enjoyed, and still ought to enjoy, by way of compensation for the burdens and restrictions so imposed upon them by the said forest laws (amongst other rights and privileges), rights of common of pasture over the waste lands within the said forests, subject to regulations from time to time made and enforced by the said Forest Courts:

[Several ancient charters were referred to in support of this.]

That the rights of common of pasture so granted or permitted as aforesaid, had from time immemorial been enjoyed by the owners and occupiers of lands and tenements lying within the forest, whose cattle had always been depastured on such of the

wastes of the said forest as for the time being had been found most convenient, without regard to the boundaries of the parishes or manors in which their lands and tenements were situate, and subject only to the regulations made by the said Forest Courts, and particularly by the Court of Attachments:

[Various old presentments and orders were referred to in support of this.]

The bill further alleged that the Plaintiffs and their predecessors in title, and their respective tenants, and the other owners and occupiers of lands and tenements lying within the said forest, had in fact from time immemorial enjoyed, as of right, and without interruption, by virtue of the said forest laws, as appendant or appurtenant to their respective lands and tenements lying within the said forest, common of pasture for all manner of cattle commonable within the said forest, levant and couchant, upon their respective tenements, over the waste lands of the forest:

That the Defendants, as lords of the said manors or reputed manors respectively, or in some other capacity, pretended to be entitled to inclose the waste lands of the forest, and to dig up and destroy the herbage, and had respectively, during the last few years, inclosed, or authorized or sanctioned the inclosure, of large tracts of the wastes.

The bill, after specifying inclosures made by the several Defendants, amounting in the whole to nearly 3000 acres, and also acts of destruction in relation to the herbage, further alleged that the inclosures, and other acts complained of, were purprestures and encroachments on the forest, and that the Plaintiffs and the other persons entitled as aforesaid were by reason thereof deprived of or impeded in the use of their common rights over the waste lands. That certain of the Defendants alleged that they respectively, and their respective predecessors in title, had sold and conveyed to the Defendant *Lake*, and also to the Defendant *Williams*, certain pieces of inclosed waste land specified in the bill, which were then respectively in their occupation, and of which they respectively claimed to be owners by virtue of such conveyance; that the names of the other persons to whom portions of the said waste lands were alleged to have been sold or conveyed, and who claimed to be owners of such waste lands, and of the names of the

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other persons (if any) who claimed to be owners of waste lands within the forest, were unknown to the Plaintiffs, and could not be ascertained by them without a discovery from the Defendants, but the said persons were too numerous to be made parties to the suit:

That the Crown rights of forest over some of the inclosed and waste lands within the forest had been sold under statutory powers, but the Crown rights of forest had never been extinguished; and as to the greater part of the forest, they were still vested in the Crown, and the sales had not, as against the Plaintiffs or the persons on whose behalf they sued, disafforested any part of the forest, or affected their rights of common:

That the other owners and occupiers of lands and tenements in the forest who were entitled to common rights were too numerous to be made parties to the suit, but had a common interest with the Plaintiffs, and concurred in asking the relief prayed by the bill:

That the Attorney-General claimed, on behalf of the Crown, an interest in the matters in question in the suit, and was a necessary party.

The bill prayed for a declaration that the Plaintiffs and the other owners and occupiers of lands and tenements within the forest were entitled, in right of and as appendant to their several lands and tenements within the forest, to a right of common of pasture upon all the waste grounds within the forest for all manner of cattle commonable within the forest, levant and couchant, upon their respective lands and tenements within the forest, and for an injunction to restrain the Defendants from inclosing or building upon, or suffering to remain inclosed or built upon, any part of the waste lands of the forest which were subject to the commonable rights, and from digging up or destroying the soil of the waste lands or the herbage thereon.

The Defendants *Glasse* and *Collyer-Bristow*, with two other Defendants, demurred to the amended bill, and the demurrers were overruled by the Master of the Rolls. The demurring Defendants then appealed, and the appeal was heard by the Lords Justices, who held, affirming the decision of the Master of the Rolls, that the right alleged by the bill was one which might exist

by law, and was sufficiently pleaded; that the bill was not objectionable as being on behalf of occupiers as well as owners; that the persons who claimed to be owners of the lands alleged to have been improperly inclosed were sufficiently represented; and that as the bill was filed to establish one general right, the Defendants could not successfully demur on the ground that they might have separate defences (1).

The Defendants then put in their answers. The main grounds of defence appear from the following passages from the answer of the Defendants *Glasse* and *Collyer-Bristow*:—

"We believe that the said forest laws do not forbid the inclosure of any of the waste lands within the forest, or the erection of any fences or other obstructions thereon, but otherwise; and that it is not the fact that the lords of the several manors within the said forest are not, or that they never were able, or merely by the consent of the homages of their respective manors, to inclose, or to grant to any other person a right to inclose, any part of the waste lands of their respective manors lying within the said forest. We believe it is not the fact that no inclosure can be lawfully made in the said forest in prejudice to the rights and privileges existing within the said forest, or without a license made under the authority formerly vested in the Chief Justice in Eyre of the said forest, and granted upon the view of two or any of the verderers, and we make out the contrary in manner herein appearing. We believe that every such license ought not to be subject to a proviso that the inclosures thereby authorized should not be prejudicial to the forest, or to the rights of the Crown in vert and venison, but otherwise; for we believe and submit that the forest laws (assuming such laws to exist, which we do not admit) do not forbid inclosures of the waste lands within the forest wherever a custom exists in a manor within the forest (as it does in our said manors) for the lord of such manor to grant the waste lands with the consent of the homage; and further, that such lord has, under the *Statute of Merton*, the right of approving any part of the said wastes; and that manors which happen to be within the said forest are not ex-

(1) Law Rep. 7 Ch. 456.

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empted from the last-mentioned statute; and that the right of the lord of the manor of *Wanstead with Stonehall* to grant part of the wastes of such manor, with the consent of the homage, was decided in the lord's favour in the year 1834, in an action at law of *Spering* v. *Willis*; and that the right of the lord of the manor of *Wanstead with Stonehall* to approve under the *Statute of Merton* was decided in the lord's favour in the year 1853, in an action at law of *Lake* v. *Plaxton*; and that although a license from the Crown may formerly have been obtained with reference to some inclosures of the waste lands, that such license has not for many years past been, and is not now required or granted by the Crown; and that all the rights of the Crown, whatever they may have been, with respect to such license, have long ceased to be recognised or to exist. And we say that all the inclosures made by us, or by our predecessors in title, of any part of the wastes of the said several manors of which we are lords, were and have been lawfully and properly made, either with the consent of the homage, or under the *Statute of Merton*, or with license from the Crown during the time such license was required and obtainable, and that such inclosures cannot be questioned or disturbed.

"That upon the disafforestation of *Hainault Forest*, which was part of the said *Waltham Forest*, no such claim to right of common of pasture over the waste lands within the said forest, or any part thereof, as is alleged by the bill, was made by any person or persons whomsoever. And we say that no part of the soil of the forest within its ambit has belonged to the Crown since the grants by the Crown of the several manors in the bill mentioned; and that so far as we have been able to ascertain, none of the grants contain the reservation of such a right as is referred to in the bill; and that some of the manors are by grants in terms granted quit of the regard of the forest, and which we submit is altogether inconsistent with and fatal to the claim set up by the bill. And, moreover, that such right, if it ever existed, which we do not admit, was always subject to the right of the lords of the manor within the ambit of the forest to inclose and make grants of the wastes of their respective manors, and has been extinguished by the sales and conveyances by the Crown of its forestal rights.

"To the best of our knowledge and belief the rights of common of pasture granted or permitted, as in the bill mentioned, have not been from time immemorial, or from any time, or in fact, enjoyed by the owners or by the occupiers of lands or of tenements lying within the said forest; and we make out the contrary by saying and averring that we have not, and to the best of our belief our predecessors in title have not, at any time allowed or recognised such alleged rights, and that such rights have not been exercised in, over, or upon any parts of the wastes of the said several manors of which we are lords, and do not by law exist. To the best of our knowledge and belief the cattle of such owners and occupiers, or of any or either of them, have not always or during any period been depastured on such of the wastes of the forest as for the time being have been found most convenient, or without regard to the boundaries of the manors or of the parishes in which their lands and tenements are situate, or subject only to the regulations made by the Forest Courts, or in particular by the Court of Attachments; and we make out the contrary by saying and averring that we have not, and to the best of our belief our predecessors in title have not, allowed or recognised any such right of depasturing, and that such right of depasturing has not been exercised in, over, or upon any parts of the wastes of the said several manors of which we are lords, and does not by law exist. We believe it is the fact that by some orders of the Court of Attachments the reeves of the several parishes lying within the forest were ordered to distinguish the cattle commoning within the said forest which belonged to the inhabitants of the different manors and parishes by marking them on certain days appointed by the Court with various brands provided for that purpose; and we say we believe that the cattle belonging to the owners of lands within the precincts of each particular manor have been and are marked by the reeve of each manor, so that the cattle of the owners of lands within the precincts of the several manors can be distinguished, and so that there should not be a surcharge of the waste lands of such several manors, and so that the respective owners of such cattle may be enabled to distinguish them on the occasion of the wastes of the said several manors within the forest being cleared of cattle in the fence month."

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Mr. *Manisty*, Q.C., for the Plaintiffs :—

The Plaintiffs in this case are owners and occupiers of land in the *Forest of Epping*, which was originally part of the *Forest of Essex*, and which comprises twelve parishes or parts of parishes. They claim that the owners and occupiers of lands within the ambit of the forest have a right to turn out and depasture any cattle levant or couchant, being cattle commonable in the forest, or any part of the great waste of the forest. This right was a forestal right, not a manorial right. It was not limited to the parish within which the lands or tenements of any owner or occupier were situated, but was co-extensive with the forest. The Defendants allege that the lords of the manors within the forest appointed reeves to see that the right was properly exercised, and that it was kept within the bounds of the manor; but the evidence shews that such restrictions have only been enforced within the last twenty or thirty years. There is abundant evidence to shew that the reeves were not appointed by the lords of the manors at all, but they were officers appointed by the ancient forestal Courts on the recommendation of the parishioners of the several parishes. The reeve had a mark called the "forest mark," and it was his duty to mark all the beasts that were brought to him from any part of the parish to which he belonged, and the forest mark was a passport to the whole forest.

It is said that all the rights of the forest and all the forest regulations are gone; but there is clear evidence to the contrary. Indeed, the custom of the "fence month," when all the cattle that were not driven off and taken home were impounded, remains to the present time.

The Defendants say that the forest laws do not forbid the inclosure of any waste lands within the forest, and they rely on the case of *Lake* v. *Plaxton* (1), as shewing the right of the lord of the manor of *Wanstead* to approve under the *Statute of Merton;* but that point was there not really gone into, and the only point decided was that the right of the Crown to turn deer on the waste did not form an element for the consideration of the jury on the question of the sufficiency of common in a case where no deer had been turned on the waste for upwards of twenty years.

(1) 10 Ex. 196.

The Defendants further allege that upon the disafforestation of *Hainault Forest*, no such claim to right of common of pasture over the waste lands of the forest as is alleged by the bill was made by any person or persons whomsoever. But in the case of *In re Hainault Forest Act* (1) the right of common in respect of the five parishes comprised in that forest was held to be exerciseable irrespective of manorial rights.

It is alleged in one of the answers that the rights of common claimed by the bill, whether as first created or subsisting, or as subsequently enlarged, would not affect any manor further or otherwise than by subjecting the waste to common *pur cause de vicinage*, or to a further or more extended right of such common. The validity of such a right was considered in the cases of *Jones* v. *Robin* (2), *Prichard* v. *Powell* (3), and *Clarke* v. *Tinker* (4), which decided that a right of common *pur cause de vicinage*, pleaded in respect of a private estate, and alleging such common to exist by custom, was bad, and therefore a right to such common was not shewn by alleging that the farms of *A.* were contiguous to each other and were not separated by any fence, and that the sheep from the one farm were from time immemorial accustomed to go to the land of *B.* and to intermix with the sheep feeding there. Then there is a case of *Boulcott* v. *Winmill* (5), where a grant had been made to one of the tenants of a manor in the forest, but nothing was decided in that case affecting the rights of commoners over the waste. The same may be said of *Barrington's Case* (6).

[The MASTER OF THE ROLLS:—*Boulcott* v. *Winmill* appears to have been a collusive action.]

In conclusion, I submit that if we establish the right of owners and occupiers of lands and tenements within the forest to have common of pasture over the forest, all other questions fall.

The whole of the documentary evidence and the affidavits on behalf of all parties having been put in, and a large number of

(1) 9 C. B. (N.S.) 648.
(2) 10 Q. B. 581.
(3) Ibid. 589.
(4) 10 Q. B. 604.
(5) 2 Camp. 261.
(6) 8 Rep. 136 b.

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witnesses examined, the arguments were resumed. The general effect of the evidence appears from the judgment.

Mr. *Joshua Williams*, Q.C., Mr. *Fry*, Q.C., and Mr. *W. R. Fisher*, followed on behalf of the Plaintiffs:—

The evidence clearly proves the right of the owners and occupiers of land to turn out their cattle upon all parts of the waste of the forest irrespective of parish boundaries. One of the defences is that this is only a right of common with respect to vicinage.

The law as to common of vicinage is to be found in *Viner's* Abr. "Common" (1); *Tyrringham's Case* (2); *Jones* v. *Robin* (3); *Smith* v. *Baynard* (4); *Clarke* v. *Tinker* (5); *Prichard* v. *Powell* (6); *Corbet's Case* (7); and in *Manwood* on Forest Land (8). The right to inclose lands in a common field was considered in *Hickman* v. *Thorny* (9). The result of the authorities appears to be, that to establish common of vicinage the manors must be adjoining, or there must be contiguous wastes; that the rights must be reciprocal; and that no tenant of a common has a right to intercommunication beyond the extent of his own common. The evidence fails to shew that any of these incidents exist in the present case, and the burden of proof being on the Defendants, it is submitted that the right we claim is not right in respect of vicinage, and is therefore not a right that can be stopped by inclosure.

The next defence is the *Statute of Merton;* but that statute is merely an affirmance of the common law. They must prove that there is enough of common left, but that they do not do: *Betts* v. *Thompson* (10).

Then it is said that the lord of the manor has by immemorial custom the right to make grants of the wastes of the manor, to be holden by copy of court roll, according to the custom of the manor; in some cases by the will of the lord, and in others with the consent of the homage. But no such custom can affect the

(1) K.
(2) 4 Rep. 36 b.
(3) 10 Q. B. 581, 620.
(4) 3 Keb. 388.
(5) 10 Q. B. 604.
(6) 10 Q. B. 589.
(7) 7 Rep. 5 a.
(8) 5th Ed. p. 86.
(9) Freem. Q. B. 209.
(10) Law Rep. 6 Ch. 732.

rights of other commoners: *Watkins* on Copyholds (1); *Barrington's Case* (2); *Wells* v. *Pearcy* (3). This is further shewn by the cases where it has been held that the by-laws of a manor, though binding on the tenants, are not binding on strangers: *Scriven* on Copyholds (4). A custom that is alleged to be binding upon strangers is an unreasonable custom, and therefore void.

In *Badger* v. *Ford* (5), which was a case upon this very forest, where it appeared that the lord of a manor had been in the habit for 150 years of granting leases of parcels of the wastes, under which inclosures were made, and that under similar leases the whole of the common in question was inclosed in the year 1810; an action having been brought by a commoner against the lord for inclosing the common and building upon it, it was held that there could not have been such a reservation of a power by the lord at the time of the original grant as to enable him to annihilate the right of common altogether.

Again, in *Arlett* v. *Ellis* (6) it was held there could be no right in the lord to inclose parcels of the waste so as to abridge the rights of the commoners, unless there was sufficiency of common left for all the persons having rights of common on the waste.

Whether a grant is made under the *Statute of Merton*, or under a custom to grant copyholds, to grant parts of the waste of the manor, the onus is on the lord to shew that he has left sufficiency of common. Here it is submitted that there is no evidence, and no attempt to produce evidence that sufficiency of common has been left.

Another ground of defence is the sale of the forestal rights of the Crown under 10 Geo. 4, c. 50, s. 98. But neither the sale of Crown rights nor the destruction of the forest can affect the rights of common. It cannot operate as a grant of free warren except over a man's own land: *Reg.* v. *Conyers* (7); *Attorney-General* v. *Parsons* (8).

We do not ask for any injunction as regards lands which on the 14th of August, 1871, were covered with buildings, or inclosed as

(1) 4th Ed. vol. i. p. 49, n.
(2) 8 Rep. 136 b.
(3) 1 Bing. (N.C.) 556.
(4) 4th Ed. vol. ii. p. 625.
(5) 3 B. & A. 153.
(6) 9 B. & C. 671.
(7) 8 Q. B. 981.
(8) 2 Tyr. 223.

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gardens for such buildings, or as regards lands which were actually inclosed on or before the 14th of August, 1851.

Mr. *Southgate*, Q.C., Mr. *Henry Matthews*, Q.C., Mr. *Nalder*, and Mr. *H. Cowie*, for the Defendants *W. B. Glasse*, *A. A. Collyer-Bristow*, *C. W. H. Sotheby*, and *C. H. Lake*:—

The right here claimed is a right on the part of every owner and occupier of land within the forest to common of pasture over the whole waste of the forest. That there may be such a right by grant or prescription is settled by the decision on the demurrer (1); but it cannot be had by mere custom. The right being claimed by prescription, that is, by the fiction of a lost grant, may be defeated by shewing that the balance of probabilities is against the right in its origin being the same as the right now claimed. That the right was originally confined to the King's waste, and did not extend over all the waste, is plain from Sir *William Jones'* (2) and *Manwood's* comments (3) on the *Ordinatio Forestæ;* and it is not to be thought that the King, even in those early days, granted common of pasture over other people's lands as compensation for the burdens imposed on the grantees by the afforestation of their lands. The fact of the extent of the forest having varied from time to time is also against the probability of such a grant as is here sought to be implied. Assuming the truth of the Plaintiffs' theory as to the right being a compensation for the burden of the forest laws, and in fact created by the forest laws, the fairer way is to regard the right as having been imposed on the owners of land, not for all time, but for so long only as the forest laws subsisted. Then, as the forest laws fell into desuetude, and the district became disafforested, the original rights of the owners of land revived.

We submit as the result of the documentary evidence, and as a reasonable and probable view of the matter, that the right in its origin was a right of common of pasture over the King's waste, granted by the King as compensation for the forest laws, and subsisting only while and so far as the forest laws are in force, coupled with the ordinary manorial right of common of vicinage; and the circumstance that even on numerous occasions, owing to the absence of fences, cattle strayed where they had no right to be,

(1) Law Rep. 7 Ch. 456. (2) Page 291. (3) 5th Ed. p. 83.

will not be sufficient to create the universal right contended for by the Plaintiffs. The fair inference from the evidence is, that the right here claimed is a right of common appurtenant within the parish, and a right of common of vicinage elsewhere.

It has been argued that it cannot be common of vicinage, because the common of vicinage cannot be between more than two manors; but that is not so, for the waste in which common of vicinage is claimed may be in several manors: *Bromfeild* v. *Kirber* (1); *Viner's* Abr. "Common" (2); *Woolrych* on Rights of Common (3). No doubt the waste in which common of vicinage is claimed must be "one entire place," as Chief Justice *Holt* says in *Bromfeild* v. *Kirber;* but if there be, as here, one continuous waste, then any number of manors may have common of vicinage in it, provided their respective commons be adjoining thereto.

If there be any foundation for this claim, it is singular that it was not advanced in the case relating to *Hainault Forest: In re Hainault Forest Act* (4). The inclosures now complained of are justified by the decision in *Boulcott* v. *Winmill* (5) upwards of sixty years ago. In the absence of objection on the part of the Crown, a lord of a manor within the forest had the same right to inclose as a lord of a manor without the forest; and now that we have purchased the Crown rights, there is nothing whatever to prevent our inclosing.

The *Attorney-General* (Sir *R. Baggallay*), and Mr. *W. W. Karslake*, for the Crown, took no part in the argument, and did not ask for costs.

Mr. *Chapman Barber*, for *Thomas Humphreys*, the lord of the manor of *West Ham*, and *Colegrave*, the lord of the manor of *Cann Hall*, as regards the manor of *West Ham*, disclaimed at the bar; and it appearing that there was no waste of that manor which was subject to the claim of the Plaintiffs, he was dismissed with costs.

Mr. *Cookson*, for the Defendant *J. Pardoe*, the lord of the manor of *Leyton*.

(1) 11 Mod. 72.
(2) K. 15.
(3) Page 48.
(4) 9 C. B. (N.S.) 648.
(5) 2 Camp. 261.

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Mr. *Kekewich*, for Miss *Frances Evelyn Maynard*, the lady of the manor of *Walthamstow Toney*, and for Mr. *Robert Boothby Heathcote*, the lord of the manor of *Chingford Earls*.

Mr. *Cecil Russell*, for Mr. *Edward Warner*, lord of the manor of *Highams*.

Mr. *Rigby*, for Mrs. *James Hodgson*, the lady of the manor of *Chingford St. Paul's*.

Mr. *W. F. Robinson*, for the Rev. *T. Mills*, Mr. *Charles Druce*, and Mr. *James Mills*, the lords of the manors of *Chigwell* and *West Hatch*.

Mr. *W. P. Dickins*, for Sir *Herewald Wake*, the lord of the manor of *Waltham Holy Cross*.

Mr. *T. C. Wright*, for Mr. *Hall Dare*, the lord of the manor of *Thoydon Bois*.

Mr. *Langworthy*, for Mr. *John Williams*, who had been made a Defendant to represent the purchasers of inclosed portions of waste.

Mr. *J. T. Humphry*, for Mr. *John Whitaker Maitland*, lord of the manor of *Loughton*.

Mr. *Freeling*, for Mr. *G. Wythes* and Mr. *J. M. Colegrave*.

Sir G. Jessel, M.R.:—

Mr. *Manisty*, I will not trouble you to reply.

The case has occupied a very long time. I do not say a longer time than it ought to have occupied, having regard to the enormous mass of materials which was put into the hands of the counsel who had to argue the case. But I lament the enormous sum of money which must have been expended in costs, because I cannot help feeling—so far as I am concerned at all events—that a comparatively small portion of those costs, properly expended, would have been sufficient to have enabled me to decide the issues in the case.

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Now, to my mind the matter is very plain and very clear. The nature of the proof required to establish the claim of the Plaintiffs appears to me to be also a kind of proof well known and long used in our Courts both of Law and Equity.

The case of the Plaintiffs is one, if I may say so, of extreme simplicity. The Plaintiffs allege that in a certain district of country, comprising originally some 60,000 acres, there was a great waste. Whether the whole of the great waste was at any time perfectly continuous is not clear, but I imagine that it was; at all events, I think it is pretty clear that the whole of the great waste in *Epping* was continuous. Whether the waste in *Hainault* was or was not continuous, is not proved, either way, to my satisfaction; in fact, the investigation as to *Hainault* has not been pursued to the same extent, or with the same minuteness, as it has been so far as regards *Epping*. By *Epping*, I mean the remaining forest of *Epping*; by *Hainault*, I mean the disafforested forest of *Hainault*. The two together were, formerly, sometimes called the *Forest of Essex*, sometimes the *Forest of Waltham*, and sometimes *Epping Forest*.

Hainault has been put out of the case, because the wastes of *Hainault* have been inclosed, and no longer form the subject of litigation.

The only subject of the present litigation are the wastes of the *Forest of Epping*. These wastes, at the present moment, consist of a very large tract, nearly 4000 acres, which, in the course of the argument, has been called "the Great Waste," and some detached portions. The larger of the detached portions I feel no doubt were formerly connected with and formed part of "the Great Waste." I think it not improbable that the smaller were also so connected, but really nothing material turns upon it.

The Plaintiffs say—putting it shortly—that the owners and occupiers of land within this forest are entitled to rights of common appurtenant for certain commonable beasts, levant and couchant upon their lands over the wastes of the forest; that is, over this tract of country, which was 6000 acres or thereabouts before the inclosures, and is now about 4000 acres. They claim in this suit, on behalf of themselves and all other the owners of land within the forest, to establish this right of common. They say that it is

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the ordinary common appurtenant to their land. It is limited in various ways: it is limited, in the first instance, to two kinds of beasts, which were called in the papers neat beasts and horses; it is limited also by the forestal customs, one of which was that during a month of the year, called the fence month, no commoning was allowed; it was also limited in another way—that, being all in a forest, the King had a right to put his deer in the forest, and of course he would not allow the commoners to prevent the feeding of the deer. But, subject to these limitations, it was an ordinary right of common appurtenant.

Now, how is such a claim to be made out? It may be made out by calling old persons who can prove that for sixty years and upwards this right, as alleged, has been exercised. The Plaintiffs accordingly called a very great number of witnesses, who have proved to my satisfaction, first, that during the whole period there was a division of this forest or tract of country into parishes or vills. When I say "parishes," that is not quite accurate, because in some cases only a portion of the parish was within the forest. Still, I use the term "parishes" to describe the parochial limits. They have proved, secondly, that for each of these parishes there was a forest officer appointed, who was called a reeve. He was nominated by the inhabitants of the parish, I suppose—although it is not clearly proved in every case—in vestry assembled, and he was sworn in at the Forest Court. This reeve had a duty to perform of marking the beasts which were allowed to go on the common, and, as a matter of fact, it appears that there was a reeve for every parish, except in one instance in which the parish —being a very large one—was divided into separate hamlets for the relief of the poor, and in that case there seems to have been a reeve for each hamlet. It is hardly worth mentioning, as it is so trivial an exception. In fact, there was a reeve for each parochial division, or each division for the relief of the poor. This mark was a letter with a crown, and was called the forest mark; and, as far as I gather from the evidence—although there is some difficulty about one hamlet or portion of a parish called *West Ham* —the letters seem to have been in the order of the alphabet—*A*, *B*, *C*, *D*, *E*, and so on; a complete series of letters; and each reeve marked the cattle of the inhabitants entitled to common,

the measure of the right of common being levancy and couchancy, (until an attempt, which I shall advert to presently, was made in the last century to alter it), and the beasts when marked were turned out.

One of the great contests in the case has been, where were they turned out? My opinion—upon a careful consideration of the evidence in the case—is, that they were turned out wherever the owners pleased in the parish or in the neighbourhood of the parish. The turning out was not confined to their particular parish. I can find very few instances of turning out beyond the neighbouring parish, but the reason is obvious, and has been stated by more than one witness, that, as a rule, the people turned out near their own homes when the cattle were marked at or near their homes, or near the marking place when the cattle were marked at the marking place—the reeve attending under orders made by the Forest Court at a certain marking place for the parish at certain stated times in the year.

It also appears that occasionally persons did drive their cattle to a distance for a particular reason—with the view of obtaining better feed for them outside the limits of the parish where they were marked.

In addition to the evidence of living persons, there is also this to be said—that there are a series of records of ancient claims, dating from upwards of two centuries ago, a series of records claiming the right to turn out on the wastes of the forest; that is, treating the wastes of the forest as an entire thing so far as commonable rights were concerned, shewing that this notion of being entitled to a right of common over the waste of the forest is not a new notion; it is not a new idea, but it is an old idea, which was entertained more than two centuries ago. With this great body of evidence, and under these circumstances, what am I to consider proved? First of all, what is this thing called? Everybody knew it as the forest right—so the waste was called "Forest Waste," or "the Forest," or sometimes "the Forest Wastes" in the plural. Is there such a thing as any other name? When I turn to the portions of the wastes in the parishes, I find them described either as "the Forest," or as "the Forest" with the name of the parish added; for instance, the waste in *Walthamstow* was some-

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times called "the *Walthamstow Forest.*" They never called it the Common of the Parish of *Walthamstow,* or the Parish Common. Sometimes it was called a portion or part of the forest waste in the parish. I cannot find a trace anywhere of there being a parish common. Therefore we have that kind of identity of the district in question which shews it for this purpose (that is for the purpose of common) to be one waste. In fact, the only thing against its being one waste, is the fact of the soil being in the different lords of the manors within the ambit of which, of course, the different portions of the "Great Waste" lie. Now what more do you want to prove a right of common? Nobody in this cause has contended that you want more. I will examine, presently, the various defences; but, supposing I am right in the conclusion I have drawn from the evidence, I do not find that anybody really contests that that will prove a right of common, subject to the arguments I have heard on the law, to which I shall call attention presently.

The great point of contest, as I said before, and which was thought by the Defendants' counsel to be the most material point, was, that the turning out was not beyond the parish. Upon that I have given my opinion, but I must say that I am by no means satisfied that I should not have arrived at the same conclusion if there had been no evidence upon the subject, because there is a remarkable absence of evidence the other way. If it had been true that the right to turn out was confined to the ambit of the parish, I should have expected to have found some traces of prohibition of turning out beyond. It appears, certainly, that until quite within a recent period the reeves were in the habit of impounding cattle improperly on the waste, and it appears in evidence that they did impound them for two causes; one was for straying in the lanes or on to inclosed lands, and the other was for not being marked. I know that in very modern times the marking has fallen very much into desuetude, and the forest customs and usages have almost all ceased to be put in force, but that was the practice whilst they were in force. You have not a trace of any beast having been impounded for being turned out outside of the parish. Assertions were made by one or two witnesses, but when the matter came to be looked into, it became clear that there was no receivable testimony to any such effect. It is

very remarkable, if there had been such a restriction of the right of turning out, that there is no such evidence, and I am satisfied that there was no such restriction.

If this is so, and if they proved that all the people in all the parishes did turn out their beasts in that way under the claims of levancy and couchancy, there must be some quantity of proof sufficient, and when they called above eighty witnesses, I think there was proof sufficient to establish the right of common.

There are, then, various defences which I will take *seriatim*. I will, first of all, take the defences in the answers; and the best answer to take is the answer of *Glasse* and *Collyer-Bristow*, which shews what the defence really is. [His Honour then read portions of the answer before set forth:—]

They say that the right they claim to be entitled to, either with the consent of the homage or under the provisions of the *Statute of Merton*, is "to inclose such part of the waste lands of the said forest as are within the several manors of which we are lords as aforesaid, and by virtue of the custom of the manors of which we are lords, to dig up and destroy the pasture, turf, and other herbage growing thereon, and we make out our claim as lords of the said manors, and in the manner in this our answer appearing." Without reading more, the substance of the two defences so set up is this: They say that the common belonging to the Plaintiffs is what I may call manorial; that is, that the beasts were marked within the precincts of each manor, that the turning out was always within the manor, and that the rights therefore were limited to each particular manor, and of course as to other wastes beyond could not be substantiated as common appurtenant. The second right claimed, as I understand it, is, that in spite of the right of the Plaintiffs, even if otherwise established, the Defendants as lords of the manor would have a right to inclose their lands within their own manors, that is, the land of which they were lords, by virtue of some custom of the manor with the consent of the homage.

Now, the singular part of the case is this, that the Defendants find a great number of persons—some of them occupying respectable positions in society—to swear affidavits, going the whole length of the defences, as to the rights being manorial, stating that

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the beasts were marked always within the manor and were turned out within the manor. There was a very ready test of it, because in some of the parishes there was more than one manor. Therefore, the point could be very easily tried as a matter of fact. But the remarkable part of the case is that people should be found to swear to that which is certainly untrue, and which when the witnesses came to be cross-examined was made manifestly untrue, because many of them departed from what they said and admitted that the turning out was not confined to the manor, and that it at least extended to the parish. To use a familiar phrase, the whole of this part of the case broke down; and so utterly and thoroughly did it break down, that the counsel for the Defendants, whose lot it was to comment upon the evidence, said that he abandoned that contention.

The second case made was, that they had a right to inclose, independently of the Plaintiffs' right. They produced manor rolls, which shew that for a very long period of time these lords had granted small bits of waste to be held as copyhold, that is, by copy of Court roll at the will of the lord, and as a general rule, that had been done with the license of the Forest Court. But, beyond that, they shew nothing except as regards recent inclosures. When it came to the argument, the leading counsel for the Defendants said at once that they did not contend for anything of that sort. They abandoned that also. They could not allege that if the right of the Plaintiffs were made out, any such manorial custom (which at the utmost amounts to this, that the grant of waste could be made either under the *Statute of Merton*, or the common law, or custom, in some shape or other, not interfering with the right of common) would entitle them to inclose the whole of the common, or the greater part of the common, so as to abridge the rights of the commoners, provided the commoners established their general right. Therefore, the two defences taken by the answer were abandoned by the counsel when they came to argue the case. I do not remember at the present moment a case where the defence in carefully prepared answers was abandoned, and a new line of argument was taken up, in which that line of argument succeeded, and certainly this case will not be a precedent for any such proceeding.

Passing from the defences in the answer, which I might say also traverses the title of the Plaintiffs, I will now go to the defences in argument which were put forward by the counsel for the Defendants.

The first defence was this: It was said—assuming you are satisfied from the parol evidence, strengthened and corroborated to a certain extent by the documentary evidence on which the Plaintiffs rely, that this right of common is established, still, being a right claimed by prescription, it can be defeated by shewing the origin of the right, and that it is not in accordance with the right claimed. That, no doubt, is perfectly sound law; that, put in other words, if you shew user for a certain period of time—sixty years and upwards, which proves immemorial user—the law presumes a grant in accordance with that user, but the person over whose soil the user is proved to have been exercised can say, I can shew by documentary evidence what the origin of this user was, and that it is not in accordance with the right claimed.

It was said that that could be shewn from documents in evidence. The first defence taken in argument by Mr. *Southgate* was this: he said that when you come to look at the documents you will see that the only right granted was not a right over this waste of the forest, but a right over that portion of the waste of the forest which belonged to the King; that it was, in fact, simply a grant by the Crown of a right of common over its own waste. I must say that having looked at every document to which I was referred —and when I say I have looked at them, I mean having read them three or four times over—I cannot find a single document to which that observation can be fairly applied. Every one of the documents either speaks of "the wastes of the forest," or "the wastes and commonable places of the forest," specifying in some cases that the right is as well in the King's soil as in the soil of other lords; but those words are not necessary. Other documents speak of "all the wastes of the forest." But it appears to me that I am bound to construe these documents—which consist of ancient claims beginning at a very early date, the first of them being early in the fifteenth century, and the bulk of them in 1630 and 1670—in their literal sense, and I have not a shadow of a doubt that "all the wastes of the forest" and "the wastes of the forest" and "the

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wastes and commonable places of the forest," mean exactly what the words import, that is, the entire waste of the forest.

I may mention that these documents to a great extent are claims of the lords of the manors, the former owners of the very manors of which the present Defendants are lords; and, singularly enough, in 1630, with the exception of *Loughton*, every lord of a manor in *Epping* claims for himself and his tenants this very right of common for commonable cattle, levant and couchant upon their lands over the wastes of the forest; so that the lord of the very same manor claims it who now disputes the rights of the Plaintiffs. That disposes of the first defence.

The second defence which Mr. *Southgate* brought forward is this: He said, If you have a grant—that is, a presumed grant (for I do not suppose that anybody imagines that the parchment actually existed), such a presumption being one of the many fictions of the law to enable Courts of justice to give effect to long user, which has now been given effect to in many instances by Act of Parliament—there is this second ground of defence, that the extent of the forest has varied from time to time, sometimes it has been larger and sometimes it has been smaller, and you cannot have a grant over the varying wastes of a varying forest.

Now, that is a question of fact. Did it vary? I have come to the conclusion that it did not; that from the time of legal memory to the present time it has not varied at all. In order to prove that it varied, certain ancient records were tendered in evidence. Many of them were very old. The first, I think, is a charter of King *John*. The charter itself is not in evidence, but an inspeximus charter of Queen *Elizabeth* is in evidence, and it recites that King *John* had disafforested certain portions of the forest, which are no longer parcel of the forest, and I was told to infer from that, that because King *John* had disafforested, or said that he had disafforested them, therefore they were once part of the forest. Of course, that was not sufficient to prove that they were part of the forest, for they may have been illegally added to the forest; and then the King would not admit that he had illegally added and then released them from the forest, and the way he would put it would be that he had disafforested them.

The next thing was the perambulation of *Henry* III., which

certainly, if correct, shewed that the forest was a very great deal larger than it is now. It included a vast tract of land in the forest, indeed almost the entirety of the county of *Essex*.

The next thing which I think was put in evidence, was the perambulation of *Edward* I., in which it appeared, if that perambulation were correct, that the forest was very much larger, and that it included the large tract of land running down to the *Thames*—the towns or townships of *Havering*, *Barking*, *Dagenham*, and a very large quantity of land in the neighbourhood of the *Thames*.

Then there was a grant by *Edward* II. to his Consort of the *Forest of Havering*, which is recited in the nomination of justices to hold Courts for that forest.

Then there was, in addition to that, a disafforesting in 1327 of the Hundred of *Tendring*, which appears from that disafforestation to have been part of the forest.

If there were nothing else, all that evidence would certainly go some length to shew that the forest, although it never was smaller, was at one time very much larger, but in the reign of King *James* I. attempts were made to enlarge not only this forest, but pretty well all the royal forests, and those attempts were supported by the production of some of the documents which have been brought forward on the present occasion. The result was, that in the very first session of the Long Parliament an Act was passed regarding these very forests, and fixing their boundaries, but doing it in a very peculiar way, because the Act of Parliament did not merely say their boundaries for the future shall be so-and-so, but it said their boundaries from all time shall have been so-and-so; and it expressly made void all perambulations and documents which either shewed or tended to shew that the boundaries of the forest ever had been other than they were in the twentieth year of King *James* I.; so that, even supposing these documents would otherwise have been receivable in evidence, the effect of the Act of Parliament is simply to make them void. The Act of Parliament further provided that a commission should be issued to ascertain what the boundaries were in the twentieth year of King *James* I., and that those should be deemed to be and to have been from that time the boundaries of the forest. That commission was issued and the return made; and it is not disputed that

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those boundaries are the boundaries at the present day, that is, of course, adding to the present *Forest of Epping* the *Forest of Hainault,* which has recently been disafforested. So that, looking to the terms of the Act of Parliament, particularly of the 4th section, I am bound to hold, and I do hold, that the boundaries of the forest have never varied.

That disposes of the second argument which was urged upon me.

The third defence which was suggested was, that the rights of the commoners were limited to the user whilst the forest laws were in force, and ceased when the lands were disafforested.

It seems that a portion of the land in the *Forest of Epping* has been disafforested, that is, the Crown has sold its forestal rights under the terms of the Act of Parliament, the result of which appears to me to be that the purchaser of the forestal rights being the owner of the lands over which such rights extended did not become the owner of the forest in any sense, but was simply entitled to say that so far as his land was concerned the forestal rights of the Crown were extinct. There are no words in the Act of Parliament to affect the rights of the commoners, if such rights existed. Therefore I cannot conceive how the selling of those rights and the extinguishing of them destroyed the commoner's rights, unless indeed it is suggested, that, inasmuch as it is alleged in the bill—in a quotation from *Manwood,* that the original reason for granting these extensive rights of common was to commute the burthens of the forest laws—that if the burthens were released the grant was destroyed at the same time.

Of course that is utterly inadmissible. If a man grants an acre of land in consideration of the grantee covenanting to perform certain services, and if some years afterwards the grantor chooses to release the services, that does not enable him to take back the land from the grantee. Nor would it enable him to take back a right of common. I cannot imagine any way in which this right of common, once acquired, as the law presumes it to have been, can be affected by the fact of the Crown releasing, not to the commoner, but to somebody else, the forestal rights over a portion of the waste. I think, therefore, that third defence is inadmissible.

Now, the next defence was one which took a very long time in discussion, and to which a great deal of the evidence was addressed. It was said that the common right established must be presumed from the user (for, after all, the grant is presumed from the user) to be, not an ordinary common appurtenant, but a common appurtenant, so far as regarded the parish (the manorial theory was given up), with a common of vicinage over the rest of the wastes of the forest; and a claim by the lord of the manor of *Loughton*, and claims by some tenants in the *Forest of Epping*, and certain claims in the *Forest of Hainault* in 1630 and 1670, were referred to, to shew that the right was claimed in a similar way, which it certainly was in the document so referred to.

The difficulties in the way of that defence are manifold, and in my opinion utterly insuperable. In order to have common of vicinage you must have two vills or lordships, or manors with separate commons adjoining. In the present case I cannot find that there was any parish common. The first thing to be established is that there are separate commons. There was a part of the waste in various parishes; but, as there is no common belonging to a parish, there are no two separate commons at all. The very first beginning of common of vicinage fails you. When you have two manors with commons, that is intelligible enough. If the manorial theory could have been maintained by the evidence, a great deal perhaps might have been made of it. But, actually, the foundation of the theory does not exist.

Next it is said: There are about twenty parishes, and it is said that you can have common of vicinage between those twenty parishes and twenty separate commons, if they adjoin each other. I heard a very elaborate argument from Mr. *Matthews* to shew how they could adjoin each other. The answer is: Look at the map, and you will see that each parish as a rule has its common on one side of it, and does not adjoin more than one or two, at the outside, of the other commons. There is a parish or vill with waste, and then there is a parish on one side and another parish on the other. Occasionally there is a parish below, but the end parish, of course, only adjoins one other. It was said that that was possibly a case of common of vicinage. I do not think it is. In the first place, I understand common of vicinage to be

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confined to two. I read upon that subject a passage from a well-known work, *Blackstone's* Commentaries, which defines common, and, it seems to me, as far as I understand, rightly defines common. He says (1): "Common *pur cause de vicinage* is where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another. The beasts of the one stray mutually into the other's fields without any molestation from either." That accords with *Coke's* statement of the doctrine, and, so far as I know, with every authority on the subject.

I was pressed very much with a judgment, which I conceive is not very well reported, of Lord Chief Justice *Holt*, in the case of *Bromfeild* v. *Kirber* (2), which has been so often cited during the argument. As I understand it, the Lord Chief Justice there means to affirm the doctrine that you cannot go into a third common. At all events, I hold that to be the law, and it is so stated, as far as I am aware, in every book on the subject, although there is a mistake in *Comyn's* Digest (3), who puts in the words "or more," which seem to be copied into some of the text books. It appears to me that that is the true state of the law. There was great inconvenience about this common of vicinage, and I conceive that there is no reason whatever for extending it.

Then, again, there is another doctrine of common of vicinage. No doubt it sprang from a very old case in *Dyer* (4), upon which one Judge said one thing and another Judge said another; but still the *dictum* of the one Judge was adopted, and the *dictum* of the other Judge was repudiated by the great text writers since: that is, that if you have three vills, each of which has a common *A*, *B*, and *C*, and vill *B* lies between *A* and *C*, vill *B* may intercommon either with *A* or *C*, but that *A* cannot intercommon with *C*. If that is the law, as I apprehend it is, it is quite clear that the end parish in this case could by no means intercommon with the parish at the other end. That, again, is a fatal objection to its being a common *pur cause de vicinage*.

But that is not all. In common *pur cause de vicinage* you can only turn out on your own common, and stray on to the adjoining

(1) Page 33.
(2) 11 Mod. 72.
(3) Tit. "Common" E.
(4) 47 b.

common. That was the reason why there was such a contest about the turning out outside the parish, because when the Defendants failed as regards the manor, they set up, contrary to their answer, that it was an intercommoning by parishes, and when they came to it of course they were anxious to shew that there was no turning out outside the parish. I have already said that I think there was, and that would be a fatal objection also to common of vicinage.

There is another. In common of vicinage there is a limitation of the right of this sort. Neither party can put on the commons more beasts than his own common will maintain, so that if there were a vill with a large common, and a vill with a small common, the owner of land in the vill with a small common could not put on the entire common more beasts than the small common could maintain.

In the present case there is not a trace of any such limitation. Some of the parishes had very large commons, other parishes had very small commons, according to the theory of the Defendants; but there is not a trace or a suggestion of any such limitation. On the contrary, in the course of the last century, the Forest Courts attempted to regulate the number of beasts to be put on the common, and it appeared at that time that the common was surcharged; that is, that there were people who had the right of common, and who were exercising the right by putting on more beasts than the common could maintain. The Forest Courts—and I use this only for the purpose of shewing that such an idea as regulating the common in the way that common of vicinage required, did not enter into anybody's head—the Forest Courts first of all gave to poor people their full rights, and said that no one else should put on more than one horse or two cows for every £4 rental. The object of it was simply to regulate the right of common, and it was regulated equally all round, without the slightest regard to the size of the supposed parish commons.

I think when you look into all these circumstances together, notwithstanding that some of those documents say that it was common of vicinage, it is a case in which there can be no common of vicinage. If common there be, it must be the ordinary common appurtenant, and nothing else. As I said before, that is the point

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upon which the greatest amount of time and argument was expended, but it is a mere attempt to set up an entirely new case, contrary to the answers and to the evidence as far as the Defendants are concerned—that it was manorial common—in order to make out a new kind of common of vicinage.

Then I come to another point of very great importance. It is said not only was the turning out limited, but the lords inclosed against the commoners, and, although it was not pretended that the right of inclosure was a paramount right, it was said very fairly, that it afforded evidence of the non-existence of this right of common.

Now there certainly was some evidence that the rights had been forgotten or not known, for when *Hainault* was inclosed, although a very singular right of common was claimed, there was no claim to a right extending over the whole waste of *Hainault*. As regards, however, the actual inclosures, they are very carefully summarised in the tables which I have had furnished to me, from which it appears that the number of inclosures before the year 1800 was great in the whole, but that the quantity of land inclosed on each inclosure was exceedingly small.

All the ancient inclosures, I think, without exception, were of very small extent; the total acreage in each century was very small. They were almost always grants by copy of Court roll, and generally, although not quite in every instance, with the license of the Forest Court. They appear to have been small roadside encroachments, or little bits of waste, taken by a cottager, who built a cottage and then asked for a grant; just the sort of thing which nobody would care to interfere with, and exactly the sort of thing which would probably be authorized by the *Statute of Merton* or the common law. That is an encroachment which would not interfere with the right of common exercised by the remainder of the commoners; in fact, the extent is so small that one can hardly imagine these things being quarrelled with. They do not appear to me to afford any evidence whatever against the right now claimed when you consider their nature, their extent, and the circumstances under which they were made. It is not pretended that any such evidence can be obtained from the inclosures within twenty or thirty years. One cannot help seeing that

these inclosures began after the decision of the case, which has been so often referred to, of *Boulcott* v. *Winmill* (1), under the notion that if you bought up the rights of the Crown in the land so disafforested, there was an end to whatever right of common there had previously existed, and consequently, the lord, in right of his soil, with the consent of his copyholders, who had other rights of common besides their right of pasturage, might inclose at his will and pleasure; and that, I think, has been the origin of the inclosures which have given rise to this suit.

I believe I have now noticed every material defence. It remains only to consider the very important question of costs.

Now, the rule which I have always followed—and which I consider the right rule in cases of adverse litigation—is, that the cost of the litigation should be borne by the unsuccessful party. I have always been of opinion that that is the rule which sound justice requires, and that in order to exempt any person from the payment of costs, being an unsuccessful party in a litigation, a special case must be made for such exemption. In the present case, so far from finding any such special ground, I must say that I find additional grounds for making the Defendants pay the costs.

There are, first of all, those Defendants who have actually made large inclosures. If I am right in the view I have taken of the law, they have taken other persons' property without their consent, and have appropriated it to their own use. They will retain, under the exceptions proposed in the decree, of land covered with buildings, and of land inclosed more than twenty years ago, considerable portions of that property which they have illegally acquired. It does not appear to me that litigants in that position are entitled to any special consideration as to costs.

But I go further. As regards the bulk of the Defendants, they have been parties to a litigation in which they have endeavoured to support their title by a vast bulk of false evidence. Of course, if they had succeeded, I should not have allowed them the costs of that evidence. But, considering that that evidence must, I think, be wholly discredited, and that it was put in after they had seen the Plaintiffs' evidence, which ought to have made them exercise great care and caution, I cannot make them otherwise

(1) 2 Camp. 261.

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than responsible for the acts of their agents, who got up that evidence without sufficient care, and who, I think, could have avoided raising the issue on which they fail, if they had exercised more diligence and more discrimination. That is an additional reason for making all the parties who used that evidence pay the costs.

Then, as regards some of the others who really did neither the one nor the other, there are one or two who have not inclosed, and there are one or two who were not parties to this evidence. I am still unable to say that persons who claim adversely rights of this kind in a Court of Justice, and fail in their contention, should not indemnify their antagonists against the costs of that contention. Though the same circumstances of aggravation may not exist in their case, I cannot find any ground for exempting them from the usual penalty that attends unsuccessful litigants, and although I made a suggestion, that considering the great wealth and position of the actual Plaintiffs—that is the Corporation of *London*, although they sue as Commissioners of Sewers—that they might, if they thought fit, waive those costs as against these Defendants, yet the Corporation of *London* having considered that suggestion, and not choosing to waive them, I am bound to give them what I consider their strict rights, that is, the costs of the suit against all the Defendants, except of course the Attorney-General and the Defendant *Humphreys*, who, as I have already intimated, will not pay costs.

Nov. 24. The case was again spoken to, and the form of decree settled.

MINUTES OF DECREE:—Defendant *Thomas Humphreys* having disclaimed at the Bar, dismiss bill against Defendant *Thomas Humphreys* with costs to be paid by Plaintiffs.

Declare that the Plaintiffs and the other owners and occupiers of lands and tenements lying within that part of the *Forest of Essex*, in the county of *Essex*, now known by the name of *Epping Forest*, other than the waste lands of the said *Epping Forest*, are entitled in right of and as appurtenant to their several lands and tenements within the said *Epping Forest* to a right of common of pasture upon all the waste lands of the said *Epping Forest* for all manner of cattle, that is to

say, neat beasts and horses, commonable within the forest, levant and couchant upon their respective lands within the said *Epping Forest*, according to the assize and customs of the said *Epping Forest;* and let the Plaintiffs be quieted in the possession and enjoyment of their said rights.

And the Plaintiffs (having regard to the provisions of the *Epping Forest Act*, 1871, the *Epping Forest Amendment Act*, 1872, and the *Epping Forest Act*, 1873), by their counsel not asking for any injunction as regards lands which on the 14th of August, 1871, were actually covered with buildings, or actually inclosed and used as the gardens belonging to or curtilages of buildings, or as regards lands which were actually inclosed on or before 14th August, 1851—Declare that the Plaintiffs are entitled to an injunction to restrain the Defendants respectively, other than the Attorney-General and the Defendant *Thomas Humphreys*, and their respective servants and agents, from permitting or suffering to be or to remain inclosed or built upon any of the waste lands of the said *Epping Forest* other than and except (*a*) Lands which on the 14th August, 1871, were actually covered with buildings, or actually inclosed and used as the gardens belonging to or curtilages of buildings, or (*b*) Lands actually inclosed on or before the 14th of August, 1851.

Inquiry what waste lands of the said *Epping Forest* in the possession of or belonging to the Defendants respectively, other than the Attorney-General and the Defendant *T. Humphreys*, for any and what estate or interest, are inclosed or built upon other than and except as aforesaid.

Liberty to apply for an injunction or injunctions in pursuance of the declaration of right hereinbefore mentioned.

Perpetual injunction to restrain the Defendants respectively (other than the Attorney-General and the Defendant *T. Humphreys*), and their respective servants, agents, and workmen:—

1. From building upon any part of the waste lands of the said *Epping Forest* which have been inclosed since the 14th August, 1851, except such parts thereof as were on the 14th August, 1871, actually covered with buildings or actually inclosed and used as the gardens belonging to or the curtilages of buildings, and from carrying away or destroying the loam or soil of any part of such waste land except as aforesaid, and from destroying or injuring the pasture, turf, or herbage being or growing thereon, so as in any manner to prevent, disturb, or interfere with the exercise by the Plaintiffs, or the other persons entitled as aforesaid, or any of them, of their said rights hereinbefore declared over the said lands when the same shall become uninclosed.

2. From inclosing or building upon any part of the waste lands of the said *Epping Forest* now uninclosed, or which shall for the time being be uninclosed, and from carrying away or otherwise destroying the loam or soil of the said waste lands now uninclosed, or which shall for the time being be uninclosed, or the pasture, turf, or herbage being or growing thereon, so as in any manner to prevent disturb, or interfere with the exercise by the Plaintiffs or the other persons entitled as aforesaid, or any of them, of their said right hereinbefore declared in and over the waste lands of the said *Epping Forest* now uninclosed, or which shall for the time being be uninclosed.

3. From otherwise preventing, disturbing, or interfering with the exercise by the Plaintiffs or the other persons entitled as aforesaid, or any of them, of their

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said right in and over the waste lands of the said *Epping Forest* now uninclosed, or which shall for the time being be uninclosed.

Adjourn further consideration.

Defendants, except the Attorney-General and *Thomas Humphreys*, to pay costs of suit.

General liberty to apply.

Solicitors for the Plaintiffs: Messrs. *Horne & Hunter*, agents for the *City Solicitor.*

Solicitors for the Defendants: Messrs. *Collyer-Bristow, Withers, & Russell;* Messrs. *Cullington & Slaughter;* Messrs. *Markby, Wilde, & Burra;* Messrs. *Beachcroft & Thompson;* Mr. *H. H. Walford;* Messrs. *Budd & Sons;* Messrs. *Sewell & Edwards;* Messrs. *Druce, Sons, & Jackson;* Messrs. *Tamplin, Tayler, & Joseph,* agents for Mr. *W. C. Metcalfe, Epping;* Messrs. *Bothamleys & Freeman;* Messrs. *Lee, Bolton, & Lee;* Messrs. *Kingsford & Dorman;* Messrs. *Hollingsworth, Tyerman, & Son;* The *Solicitor to the Board of Works.*

M. R. 1874 *Dec.* 19.

LOWTHER *v.* BENTINCK.

[1874 L. 175.]

Will—Construction—Ejusdem Generis Doctrine—Advancement Clause—Power to apply Part of Fund for Preferment, Advancement, or otherwise for the Benefit of an Adult—Payment of Debts.

10 L.D. 228

A testator bequeathed a fund upon trust for *L.* during his life, and after his decease for his children as he should by will appoint, and in default of appointment for his children, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. The testator empowered the trustees, at any time or times during the life of *L.*, to apply any part of the fund not exceeding one moiety in or towards the preferment or advancement of *L.*, or otherwise for his benefit as the trustees should in their discretion think fit. At the date of the will *L.* was thirty years of age, and had been married for nearly three years:—

Held, that the trustees might apply one moiety of the trust fund in payment of debts incurred by *L.*, the interest on which absorbed nearly the whole of *L.*'s income, and the principal of which he was unable to pay out of his own resources.

DEMURRER.

The bill contained statements to the following effect:—

The late Earl of *Lonsdale*, by his will, dated the 18th of Feb-

ruary, 1871, bequeathed the sum of £100,000 to trustees upon trust to invest the same as therein mentioned, and to pay the income of such investments to *Francis William Lowther* during his life, and after his death to stand possessed of the £100,000 and the investments thereof upon such trusts as *Francis William Lowther* should by will appoint, and in default of such appointment for the children of *Francis William Lowther* who being sons should attain twenty-one, or being daughters should attain that age or marry, if more than one in equal shares; and if no child of *Francis William Lowther* should attain a vested interest, then over. And the testator declared that it should be lawful for the trustees, at any time or times during the life of *Francis William Lowther*, to levy and raise any part of the trust moneys, stocks, funds, and securities, not exceeding in the whole one moiety thereof, and to apply the same in or towards the preferment or advancement of *Francis William Lowther*, or otherwise for his benefit, in such manner as the trustees should in their discretion think fit.

By a codicil the testator bequeathed the further sum of £25,000 upon the same trusts.

The testator died on the 7th of March, 1872.

At the date of the testator's will *Francis William Lowther* was thirty years of age; he was a commander in the Navy, and had been married nearly three years.

Francis William Lowther was entitled (in addition to the income, amounting to £5423 6*s.* 2*d.*, arising from the funds representing the legacies of £100,000 and £25,000) to a life interest under a settlement of March, 1866, of the annual value of £868 16*s.*, and to a life interest under his marriage settlement of the annual value of £546 8*s.* 3*d.* He had borrowed sums amounting to £66,500 on the security of his aforesaid life interests, and of certain policies of assurance on his own life, effected partly in his own name and partly in those of his mortgagees. The income arising from the trust legacies had thus become subject to annual charges amounting in the aggregate to £5493 16*s.* 11*d.*; and the life interest under the settlement of March, 1866, with annual charges amounting to £578 5*s.*

The money so borrowed had been applied in payment of losses

M. R. 1874 LOWTHER v. BENTINCK.

incurred by *Francis William Lowther* in speculations on the *Stock Exchange* and in connection with the shares of joint stock companies, and he was wholly unable to repay the principal sums, or any of them, out of his own resources.

Under these circumstances *Francis William Lowther* had applied to the trustees to raise one moiety of the trust legacies, and apply the same towards the payment of the principal sums so borrowed; and the trustees, being advised that they were empowered by the testator's will so to do, intended to comply with the request.

The bill was filed by the infant children of *Francis William Lowther* against him and the trustees under the Earl of *Lonsdale's* will, and prayed for a declaration that the application of any part of the capital of the trust legacies of £100,000 and £25,000 in payment and discharge of the incumbrances created by *Francis William Lowther* on his life interest in the annual income of the trust legacies, was unauthorized and beyond the powers of the trustees; and for an injunction.

The Defendants demurred.

Mr. *Cookson*, for the demurrer:—

This is not an ordinary advancement clause, such as is found in wills or settlements containing provisions for the benefit of infants. At the date of the will Mr. *Lowther* was an adult and was married. He had no intention of entering into business; and the words "or otherwise for his benefit" cannot be cut down to mean simply "preferment or advancement." Mr. *Lowther's* income has been reduced to under £800, and upon such an income he cannot bring up his children in a manner corresponding to their social position. The proposed application of the fund is clearly for their benefit. The Courts have given a wide construction to similar expressions in similar clauses: *In re Kershaw's Trusts* (1); *Talbot* v. *Marshfield* (2). The bill does not raise any question as to the *bona fides* of the trustees; and under these circumstances the Court will not interfere.

Mr. *Davey*, for the bill:—

The sole question intended to be raised is, whether the proposed

(1) Law Rep. 6 Eq. 322. (2) Law Rep. 3 Ch. 622.

application of the funds is within the powers of the trustees. The words "or otherwise for his benefit" must be construed as meaning something *ejusdem generis* with preferment and advancement.

[The MASTER OF THE ROLLS:—My difficulty is to see what, upon that theory, they can refer to.]

Conveyancers sometimes use more words than are necessary. The trustees might be justified under the power in selling out the funds, and applying the proceeds in assisting Mr. *Lowther* to go into business; but they could not be justified in paying the proceeds to him *simpliciter*. If the trustees could not pay the fund to him directly, can they do so in another form, viz., by his incurring debts, and the trustees paying them?

SIR G. JESSEL, M.R.:—

This case is of some importance, as it really asks the Court to interpret what has become for some years past a common form. [His Honour read the clause.] The only question I have to decide is, whether a payment to the creditors of an adult who is unable to pay them himself, but whose life estate is mortgaged to secure the payment of those debts, is a payment for his benefit? Now in construing instruments I have always followed the rule laid down by the House of Lords in *Grey* v. *Pearson* (1), which is to construe the instrument according to its literal import unless there is something in the subject or context which shews that that cannot be the meaning of the words. Here I find nothing in the subject or context against it. The words which precede those which I have to construe are "preferment or advancement," both large words, but both words having, I may say, a well-known legal meaning. They are followed by the words "or otherwise for his benefit," which are the largest terms of all. The suggestion made is, that if it had been intended not to restrict the words to something *ejusdem generis*, why put in preferment or advancement at all? That is a question not very difficult to answer. It is suggested by the counsel for the Plaintiff that the conveyancer sometimes

(1) 6 H. L. C. 61. 3 Jur. N.S. 823.

M. R. 1874 LOWTHER v. BENTINCK.

uses more words than are necessary, and instead of "or otherwise for his benefit," "for his benefit" might have done. That may be so, but on the other hand it is by no means uncommon (and it would be by no means improper were it not for this *ejusdem generis* doctrine) to indicate the primary objects desired by the testator, though he does not wish to restrict the power to those primary objects. The gentleman here was thirty years old at the time; it is difficult to see what his preferment could be, he being a commander in the Navy, except setting him up in business. It seems to me that the words "or otherwise for his benefit" are evidently put in for the purpose of not confining the trustees to preferment or advancement; and therefore, so far from finding any context which restricts the words, I think the context shews that the words could not mean something of the same kind. I must decide the case upon the words as they stand uncontrolled by any context. I do not think anybody can doubt that paying this money to the creditors of this gentleman will confer a very large benefit on him; the application is strictly within the terms of the power which leaves the propriety of the exercise of it to the discretion of the trustees. The demurrer must be overruled, and the order may be prefaced by an expression of the opinion of the Court that the trustees are entitled to apply any part not exceeding one moiety of the trust funds as they exist at present towards the discharge of the incumbrances.

Solicitors: Messrs. *Ellis & Ellis.*

WEISE *v.* WARDLE.

M. R.
1874
Dec. 11.

[1874 W. 230.]

Pleading—Parties—Bankrupt Defendant—Fraud—Fraudulent Conveyance by Bankrupt.

A bankrupt is not a proper party to a suit instituted by the trustee under his bankruptcy to set aside a conveyance executed by the bankrupt with intent to delay or defeat his creditors.

The rule that a person implicated in a fraudulent transaction may be made a party to a suit impeaching the transaction, for purposes of discovery and costs, is confined to cases in which the Defendant fills the position of agent (including that of attorney or solicitor) or arbitrator.

23 L.D 62

DEMURRER.

The bill was filed by *John Weise*, the trustee under the bankruptcy of *Frederick Wardle*, against the said *Frederick Wardle* (the bankrupt) and his son *James Wardle*. The object of the suit was to set aside a deed dated the 26th of July, 1869, whereby *Frederick Wardle* voluntarily conveyed certain real estate, of which he was owner in fee, to *James Wardle* absolutely. The bill alleged that this deed was fraudulent, on the ground that it was executed by *Frederick Wardle* with the intent of delaying and defeating his creditors.

The bill further charged that there were in the possession of the Defendants, or one of them, divers deeds and documents relating to the premises comprised in the deed.

The bill prayed for a declaration that the deed was fraudulent and void, as against the creditors of *Frederick Wardle*, under the statute 13 Eliz. c. 5; for (amongst other consequential relief) delivery up by the Defendants of the deeds and documents in their possession or power relating to the premises; and for the payment of costs by the Defendants or one of them.

The Defendant *Frederick Wardle* demurred for want of equity.

Mr. *Waller*, Q.C., and Mr. *E. C. Willis*, for the demurrer, were stopped.

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Mr. *Southgate*, Q.C., and Mr. *Cookson*, for the Plaintiff:—

The general rule, no doubt, is as laid down in *Mitford* on Pleading (1). "A bankrupt made party to a bill against his assignees touching his estate may demur to the relief, all his interest being transferred to his assignees." It is, however, added in a note to this passage: "But it seems that if fraud were charged, and costs were prayed against him, he could not demur;" and this proposition is supported by the cases of *Whiting* v. *Rush* (2) and *Lloyd* v. *Lander* (3). In fact, any party to a fraudulent transaction may be made a Defendant to a suit impeaching the transaction, for purposes of discovery and payment of costs: *Marshall* v. *Sladden* (4). The allegations as to the title-deeds are sufficient to support the bill, even if it cannot be supported on other grounds.

Sir G. Jessel, M.R.:—

It is clear that this demurrer must be allowed.

It is attempted to support the bill on the ground that the allegations as to the title-deeds constitute sufficient ground for the interference of the Court. But in the first place the bill merely alleges that the deeds are in the possession of the Defendants or one of them, which is not enough; and besides, the case of *Lloyd* v. *Lander* is an express decision that the allegation, even if sufficient in point of form, would not of itself maintain the bill.

The real ground of demurrer is that the bankrupt ought not be a party to the suit. The charge is that the bankrupt has conveyed away part of his property so as to defeat or delay his creditors. Now, in respect of that property, he has no interest, nor is he under any personal liability; why, then, is he made a Defendant? It is said that he has been party to a fraud, and that he may be made a Defendant for the purposes of obtaining discovery and payment of costs. Now it is true there is a rule that a mere agent may in certain cases be made a party to a suit, but that rule has been disapproved of by eminent Judges in several cases. Sir *James Wigram*, in *Marshall* v. *Sladden*, speaks of the practice as "a practice of a very anomalous character." Lord

(1) 5th Ed. p. 187.
(2) 2 Y. & C. (Ex.) 536.
(3) 5 Madd. 282.
(4) 7 Hare, 428.

Cottenham, in *Attwood* v. *Small* (1), pointed out various objections to it. It is obvious from the tenor of his Lordship's observations that he disapproved of the practice, and that he would probably have advised the House of Lords to overrule it, had an opportunity presented itself; at all events it is plain that the practice is not to be extended. I consider that the practice as it now exists applies only to cases in which the Defendant is an agent (under which term is included the case of his being an attorney or solicitor) or an arbitrator; this Defendant is neither, and the demurrer therefore must be allowed with costs.

Solicitors: Mr. *John Burton*, agent for Mr. *Onions*, *Market Drayton*; Messrs. *Mercer & Mercer*.

(1) 6 Cl. & F. 232, 352–353.

V.-C. M.
1874
Nov. 9.

COLES *v.* PILKINGTON.

[1874 C. 92.]

Statute of Frauds—Part Performance—Possession—Agreement to allow Occupation for Life—Making good Representation.

The *Statute of Frauds* cannot be pleaded to a verbal agreement to allow the occupation of a leasehold house for life on payment merely of ground rent, rates, and taxes, if there has been a part performance by possession under the agreement and the agreement has affected the mode of living of the occupying party.

Loffus v. *Maw* (1) approved of.

IN the year 1848 one *Sarah Coles* purchased for £900 a leasehold interest in a house, No. 7, *Park Place, Upper Baker Street, Regent's Park*, which was held for a term, of which twenty-seven years less thirty days were unexpired at Lady Day, 1874.

For a time she resided in the house, but she afterwards removed to another residence, and allowed her half-sister, *Ann Heath*, who was in indigent circumstances, to reside there rent free, on condition of paying the ground rent and rates and taxes. *Ann Heath* continued to reside there till her death, which took place on the 23rd of January, 1861.

In the year 1859 the Plaintiff, who was a second cousin of *Sarah Coles*, and had previously been in domestic service as a cook, went to reside at the house as servant to *Ann Heath*, and continued with her till her death.

After *Ann Heath's* death the Plaintiff continued to occupy the house rent free under a verbal arrangement with *Sarah Coles* under circumstances which, according to her view, were as set forth in the 5th and 6th paragraphs of the bill as follows:—

"5. Upon the death of *Ann Heath*, and in the same month of January, 1861, the Plaintiff entered into negotiations with one *Emma Swales*, of 55, *Hornsey Road, Holloway*, in the county of *Middlesex*, to join her in the bonnet and millinery business, and also entered into negotiations through *Mary Swales*, the mother of the said *Emma Swales*, for taking a house in *Dorset Crescent, East*

(1) 3 Giff. 592.

Road, Hoxton, for the purpose of there carrying on the said business.

"6. About a fortnight after the death of the said *Ann Heath,* and whilst the said negotiations for the Plaintiff joining the said *Emma Swales* in the said business, and for taking the said house in *Dorset Crescent,* were in progress and almost finished, and the terms were substantially arranged, but before the said negotiations were finally settled and completed, the said *Sarah Coles* called upon the Plaintiff at No. 7, *Park Place,* aforesaid, and, telling her not to take any other house, promised that the Plaintiff should have the said house, No. 7, *Park Place,* aforesaid, during the Plaintiff's life, to let out in lodgings, and so to maintain herself, the Plaintiff paying the ground-rent and all rates and taxes in respect of the same house, but without any further rent or payment; and on the faith of such promise the Plaintiff determined to make her living by letting lodgings at No. 7, *Park Place,* aforesaid, and to abandon the proposed bonnet and millinery business, and accordingly, and on the faith of the said promise, she broke off the negotiations for the said business and for the said house in *Dorset Crescent,* and continued to live in the said house, No. 7, *Park Place,* where she has ever since resided, and still resides, maintaining herself by letting lodgings, and paying only the ground-rent of the last-mentioned house and the rates and taxes in respect thereof, but without paying any other rent for the said house."

Sarah Coles died on the 2nd of March, 1871, having by will, dated the 29th of January, 1861, given all her real and personal estate to the Defendant, and appointed him her sole executor. Her estate was, for the purpose of obtaining probate, sworn under £12,000.

The Plaintiff continued to reside in the house during the lifetime of *Sarah Coles,* and for some time after her death, without paying any rent, and supported herself by taking in lodgers. But in August, 1872, the Defendant endeavoured to make some arrangement for allowing one *Alfred Heath,* a son of *Ann Heath,* to reside there as a lodger with the Plaintiff. The arrangement however turned out impracticable, and the Defendant then took steps to turn the Plaintiff out, and commenced an action of ejectment for the purpose.

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The Defendant's version of the arrangement between *Sarah Coles* and the Plaintiff was, that *Sarah Coles* told the latter that she was willing she should have the house during her life, provided she paid not only the ground rent and rates and taxes, but also an additional rent of £2 a week. The Defendant also stated that *Sarah Coles* always paid the premiums on the fire insurance, and that he had himself paid the ground rent which became due at Christmas, 1873.

The Plaintiff then filed the present bill. It prayed for a declaration that the Plaintiff was entitled to possession of the house during her life, or for the residue of the term if it should expire in her lifetime, she paying the ground rent and rates and taxes, and for an injunction to restrain the action.

The Plaintiff moved accordingly, but by arrangement judgment was given in the action, and the motion turned into a motion for decree.

The Defendant by his answer pleaded the *Statute of Frauds.*

The above-mentioned statements in the bill were supported by the affidavit of the Plaintiff and other persons; and the Plaintiff was cross-examined in Court without materially modifying these statements.

Mr. *J. Pearson,* Q.C., and Mr. *Blackmore,* for the Plaintiff:—

This is a case like *Loffus* v. *Maw* (1), where one person having induced another to do or abstain from doing certain things, or to adopt a particular line of conduct on the faith of promises of certain advantages, will not be allowed to evade the performance of those promises by pleading the *Statute of Frauds.* This is a settled principle in law as well as in equity: *Jorden* v. *Money* (2); *Pickard* v. *Sears* (3).

The case is also within those in which it has been decided that the *Statute of Frauds* cannot be pleaded to a parol lease where the tenant is in possession. There is a lawful possession, and the Defendant must shew affirmatively a right in himself to defeat the claim of the Plaintiff. He is a mere volunteer, and has no title to consideration superior to that of the Plaintiff.

(1) 3 Giff. 592. (2) 5 H. L. C. 185.
(3) 6 A. & E. 469.

Mr. *Glasse*, Q.C., and Mr. *Chapman Barber*, for the Defendant:—

This is a case of a mere voluntary gift without consideration, and the occupation could at any time have been determined by *Sarah Coles*, and therefore also by the Defendant. But apart from that, the agreement alleged is within the *Statute of Frauds*. *Loffus* v. *Maw* (1) is inconsistent with the cases which have followed it, and is not now law. But, assuming it to be so, it is distinguishable. The Plaintiff in that case was at least a creditor, and there was a prayer for general administration, and, moreover, the codicil might be considered as being a statement in writing signed by the party to be charged.

This case is in principle covered by *Caton* v. *Caton* (2), which was quite in accordance with *Jorden* v. *Money* (3). *Caton* v. *Caton* necessarily overrules *Loffus* v. *Maw*. To exclude the *Statute of Frauds* there must be part performance of some definite agreement, and some consideration moving from the party to be bound. Here neither of these conditions exists.

SIR R. MALINS, V.C., after referring to and commenting on the facts, and concluding from them that the Plaintiff's version of what had taken place was the true one, and that she received a gift of the house for her life from *Sarah Coles* on condition of paying only the ground rent and taxes, without any other consideration, continued:—

It is said that this gift was entirely without valuable consideration, and if valuable consideration is to be inferred only from the party receiving the gift making a gift, or giving something in return, then it is perfectly clear that there was no consideration, because it could make no difference to *Sarah Coles* then whether the Plaintiff preferred to follow her occupation of a cook or went into business as she proposed, and therefore there was, perhaps, an absence of motive. But there may be other kinds of consideration, and if the conduct of one person induces another to alter his or her conduct, that will make a binding contract, and if the Plaintiff, at an age when she was capable of gaining her livelihood, either by

(1) 3 Giff. 592. (2) Law Rep. 2 H. L. 127.
(3) 5 H. L. C. 185.

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going into domestic service or into business, was induced by *Sarah Coles*, who was rich enough to confer the benefit, to alter her conduct, by the gift of a house in which she should live for the whole of her life, with a view to gaining her livelihood by letting out lodgings, the very circumstance of her having induced the Plaintiff to alter her conduct and refrain from going into business, in which she might have done well, and got friends to assist her, and realized an independence, would be enough to make the agreement binding. And although the donor received no actual consideration, the case is one to which the passage cited by Sir *John Stuart* in *Loffus* v. *Maw* (1) from Lord *Cottenham's* judgment in *Hammersley* v. *De Biel* (2) is applicable: "A representation made by one party for the purpose of influencing the conduct of the other party and acted on by him, will in general be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation."

This, then, is a case in which the representations made by *Sarah Coles* must be held to be sufficient to raise a consideration in favour of the Plaintiff, there being a good gift, that is, an intention on the part of *Sarah Coles* to give the house and a possession in accordance with that intention.

It is argued that *Loffus* v. *Maw* is no longer law. I confess I never knew that. I have always considered it an important case, and I perfectly agree with it. It was a case where the Plaintiff, a young woman, who at the age of twenty-nine having been left a widow with one child, and unprovided for, was induced to go and reside with her uncle, an old gentleman in infirm health, as his housekeeper, on a verbal promise to make some provision for her support, and to leave her something considerable by his will. The Plaintiff subsequently discovered that her uncle had only left her a legacy of £10, and also found that the constant attendance upon him which was required was affecting her health, and threatened that if he did not provide for her she would leave him. The uncle then promised that he would leave her for life the rents of certain houses belonging to him, and ultimately caused a codicil to his will to be prepared making her this provision. This was executed and read to her, and in the expectation of receiv-

(1) 3 Giff. 603. (2) 12 Cl. & F. 62, n.

ing this provision she continued to reside with him till his death, which took place some years afterwards. It then appeared that, after the execution of this codicil, another codicil had been executed revoking the provision made for her, and Vice-Chancellor *Stuart* held that the Plaintiff was entitled to the benefits conferred upon her by the codicil made in her favour, and that the testator had no right to revoke it. Sir *John Stuart* did not so decide the case because the codicil had been made and shewn to the party to be benefited, but because it was evidence that the promise had been made; that is to say, the shewing of the codicil to the Plaintiff satisfied his mind that the promise had actually been made, and the codicil was there to shew what the promise was.

It may be, and I assume, for the purposes of my decision, that an agreement absolutely without consideration to the donor is not binding, and cannot be enforced, and that a contract to take a benefit not in writing cannot be enforced either, but it is clearly laid down, as stated by Mr. *Pearson*, that if the contracting party, on the faith of it, although not a scrap of writing can be produced, enters into possession, that is sufficient to take the case out of the *Statute of Frauds*, because the mere fact of creating the relation of landlord and tenant by the tenant entering into possession, even if he has not spent a penny, will enable him to sustain a bill for specific performance, and it cannot be resisted by pleading the *Statute of Frauds*, and it becomes no longer necessary to prove any contract in writing. In the case before me, though this woman might, and probably would, have been without remedy if she had not had possession, having had it, the possession takes the case out of the statute, and entitles her to specific performance. But she does not ask for a conveyance. She simply seeks to restrain the Plaintiff from doing that which *Sarah Coles*, if alive, would have been unable to do. On these grounds, therefore, I think that the Plaintiff is entitled to the relief she seeks in accordance with the principle laid down in *Loffus* v. *Maw* (1), which I consider to be a decision in favour of honest and straightforward dealing.

If this had been the case of a marriage contract I should have followed the decision of the highest tribunal in the land in *Caton*

(1) 3 Giff. 592.

V.-C. M. 1874 COLES v. ELKINGTON.

v. *Caton* (1): that marriage is not a part performance of a parol agreement which will take a case out of the *Statute of Frauds*. It is difficult to say why this should be the case, but it has long been the rule in this Court. The present case, however, is not one of a marriage contract, but one referring to the possession of property where possession constitutes a part performance. It seems to be a matter of regret that *Caton* v. *Caton* was not argued before the House of Lords on the ground of fraud, on which I argued it in the Court below, because fraud takes all cases out of the statute.

On these grounds, therefore, I am of opinion that the Plaintiff has established her right to a declaration that she is entitled to the messuage and hereditaments, No. 7, *Park Place*, and to the possession thereof during her life if the term granted by the lease thereof shall so long continue unexpired, or for the residue of the term if it expires in her lifetime, and to an injunction against all further proceedings in the action of ejectment; and in my opinion the whole proceeding has been so eminently unjust on the part of the Defendant that he must pay the costs of the suit.

Solicitors: Messrs. *Hand, Son, & Johnson;* Mr. *Dunster*.

V.-C. M. 1874 *Dec.* 4.

In re REHOBOTH CHAPEL.

Lands Clauses Act—Purchase-money of Freeholds—Investment in Leaseholds—Trustees for Charity.

The purchase-money of freeholds paid into Court under the *Lands Clauses Consolidation Act* may be invested in the purchase of leaseholds if the persons paying it in are charitable trustees having an absolute legal title.

THIS was a Petition by the trustees and some other persons connected with the management of a particular Baptist chapel at *Blue Gate Fields, Shadwell,* which had been taken by the *East London Railway Company* under the powers of their Acts. The purchase-money, amounting to £3150, had been paid into Court under the *Lands Clauses Consolidation Act* and invested.

(1) Law Rep. 2 H. L. 127.

The chapel so taken was freehold and had been vested in the trustees, but it appeared that there was some difficulty in finding a suitable freehold tenement as a substitute for the one taken, and it was now proposed by the Petition to take £800 out of Court for the purpose of investing it in the purchase of a leasehold interest in an existing chapel held for a term of eighty years from the 25th of March, 1853, at a yearly rent of £8 8*s.*; and the Petition prayed accordingly.

Mr. *Glasse*, Q.C., and Mr. *Locock Webb*, for the Petitioners.

Mr. *T. C. Wright*, for the company:—

It was held in *Ex parte Macaulay* (1) that the Court would not direct the investment in leaseholds of the purchase-money of freeholds.

Mr. *Glasse*, in reply:—

Ex parte Macaulay was the case of a settled estate, in which it is obvious that leaseholds would be in a very different position from freeholds. The trustees in this case are persons absolutely entitled.

SIR R. MALINS, V.C.:—

I think that the order may be made in this case.

Solicitors: Mr. *James Mote;* Messrs. *Wilson, Bristows, & Carpmael.*

(1) 23 L. J. (Ch.) 815.

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Dec. 10.

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[1874 C. 283.]

Company—Petition to wind up—When it will be restrained—Solvent Company—Disputed Debt.

A creditor of a solvent company, whose debt is *bonâ fide* disputed will be restrained from presenting a petition for winding up the company.

A contractor entered into a contract with a company for the execution of certain works for the sum of £290,000, of which £200,000 was to be paid in cash, and the rest in paid-up shares. The contractor had received £203,000 in cash, and a large number of shares, but he claimed to be entitled to a further sum of £30,000. The company disputed the claim, and alleged, on the contrary, that the contractor had been largely overpaid. The contractor threatened to present a petition to wind up the company, and served on the company a demand under the 80th section of the *Companies Act*, 1862:—

Held, that there being no proof of the company being insolvent, and the alleged debt of the contractor being *bonâ fide* in dispute, the contractor must be restrained from presenting a petition to wind up the company.

THE *Cadiz Waterworks Company* was incorporated in October, 1871, with a capital of £150,000 in 15,000 shares of £10 each. The objects for which the company was established were, among others, to supply with fresh water the city of *Cadiz*, in *Spain*, and to acquire concessions and purchase land for that object.

By the articles of association of the company the shares constituting the then capital of the company were declared to be fully paid up, and the holders were to be credited in the books of the company with the full amount thereof, and the company were empowered to increase, by special resolution, the capital of the company. It was further provided that the company should always have a paramount lien on the shares of each member, and on all dividends accruing or accrued thereon, for all his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, and the company were empowered to sell and dispose of the shares registered in the books of the company in the name of such member, either solely or jointly with any other person, and apply the proceeds, so far as the same

would extend, in discharge or satisfaction of such debts, liabilities, or engagements.

At the general meetings of the company in December, 1871, and January, 1872, special resolutions were passed and confirmed that the capital of the company should be increased to the sum of £400,000, and that the additional capital of £250,000 should be raised by the issue of 25,000 preference shares of £10 each.

On the 14th of June, 1872, a contract was entered into between the company and the Defendants, Messrs. *Barnett & Gale* (contractors), under which the Defendants were to construct certain works at *Cadiz* for the sum of £290,000. The works were to be completed within eighteen months in a substantial and workmanlike manner, under the inspection and subject to the approval of the engineer of the company, and the Defendants were to indemnify the company against all damages occasioned by the non-fulfilment of the contract, and the money due to the Defendants was to be paid by monthly instalments after the value of the work done should have been inspected and certified by the company's engineer.

It was, however, provided that the contractors were not to receive the whole of the sum of £290,000 in cash, but were to be paid in money and in shares in the proportions following, that is to say: £200,000, part thereof, in cash, and £90,000, balance thereof, in fully paid-up shares of the company; the relative proportions to be paid in cash and shares on each certificate, after payment of the first sum of £85,000, to be as £115 in cash to £90 in shares.

The contract also contained a clause for arbitration in case of any difference arising between the company and the Defendants as to the carrying out of the contract.

The bill stated that shortly after the execution of the contract the Defendants were put in possession of the land and works of the company, and began to carry out the contract, and that 2500 shares in the company were taken by the Defendants, and were allotted to them. Monthly payments were made to the Defendants by the company until they had received about £200,000 in cash and 485 shares, in accordance with the provisions of the contract.

Frequent complaints were then addressed to the company by

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the authorities of *Cadiz* as to the dilatory manner in which the works were being prosecuted.

The Defendants owed arrears of wages to their workmen, and they were unable to procure the funds requisite for carrying out the contract. Another agreement was therefore entered into on the 7th of January, 1874, between the company and the Defendants, by which it was agreed that the company should not exercise their right of determining the contract, but should advance the moneys required for completing the works, and that the company should be at liberty to set off such advances against what should be found due from the company under the original contract, and that the Defendants should give the company express authority to take possession of the works, so that they might be protected against any further delay or failure on the part of the Defendants. And it was agreed that no further transfers of shares were to be made by the Defendants to any nominees.

In pursuance of the agreement of the 7th of August, 1873, advances were from time to time made by the company to the Defendants, but notwithstanding such assistance the Defendants were still unable to complete the works under the contract, and the company received information that many of the certificates previously given by their engineer on which payments had been made to the Defendants, were considerably in excess of what had been actually due, and that large sums of money had to be paid again for work which had been already paid for, and in consequence of this no further certificates were given by the engineer of the company after April, 1874.

In March, 1874, the Defendants, Messrs. *Barnett & Gale*, dissolved partnership, and their business had since been carried on by the Defendant *Edward Barnett*, who had taken over all the assets and liabilities of the firm.

In August, 1874, in consequence of the inability of the Defendants to complete the works, the company, in order to prevent the risk of penalties being imposed upon them for the delay in completion, determined to take possession and complete the same themselves, and on the 7th of August, 1874, the Defendant *Barnett* signed a written authority to the agent at *Cadiz* to deliver the works to the secretary of the company. The company accordingly

took possession, and had since been proceeding with the execution of the works, but in consequence of the defective materials supplied by the Defendants, and of the omissions and imperfections of their work, the company had not yet been able to complete the whole of the works specified in the contract of the 14th of June, 1872.

At the date when the company took possession the Defendants had received from the company £203,143 in cash and only £47,790 in ordinary shares, but the delay in completing the works caused by the default of the Defendants, and the consequent inability of the company to earn the anticipated income, had depreciated the shares of the company, and they were now worth much less in the market than their par value; the Defendants had therefore been very largely overpaid. The company claimed to be entitled to recover from the Defendants the sum of £39,905, and other sums paid to them in excess of what was due, together with interest from the times when the over-payments were made. The company also claimed to be repaid the expense incurred by them in completing the works since the contractors gave up possession, and a proper compensation in damages for all expense and loss sustained by the company by reason of the delay and default of the Defendants in carrying out the works, and the imperfect character of the works actually executed by them, and by reason of the over-payments made to them. There were now standing in the names of the Defendants in the books of the company 290 ordinary shares and 641 preference shares, upon which the Plaintiffs claimed a lien for the amount due from the Defendants under the circumstances stated.

The Defendant *Barnett*, on the other hand, claimed a large sum as due to him from the company under the contract of the 14th of June, 1872. The directors had offered to refer the matters in dispute to arbitration, under the clauses of the contract, but the Defendants had both declined to concur in any reference for that purpose.

The Defendants threatened and intended to present a petition to this Court, asking that the company might be wound up, and on the 10th of November last, with a view to such petition, they served upon the company a demand under the 80th section of the *Com-*

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panies Act, 1862, claiming the sum of £46,894 12*s.* 4*d.* as due to them from the company.

The bill prayed that it might be declared that the Plaintiffs were entitled to a lien on the shares standing in the books of the company in the names of the Defendants for all sums due to the company by them under the contract of the 14th of June, 1872, and the agreement of the 7th of January, 1874, and for all sums by way of damages due to the company by reason of the default of the Defendants in carrying out the contract: that if the amount so due should not be ascertained by arbitration, all necessary accounts and inquiries might be taken for ascertaining the same, and that in the meantime the Defendants might be restrained by order of the Court from presenting any petition to wind up the company.

The evidence on behalf of the Defendants went to shew that they had had great difficulties to contend with in carrying out the contract, by reason of their not being put into possession of the land within the prescribed period. The Defendants denied the statements in the bill that complaints were made as to the manner in which the works were carried out. They alleged that the delay occurred entirely through the neglect and inability of the company to provide the land on which the works were to be executed. The statement that the engineer gave certificates for work which afterwards turned out not to have been done was also denied, and that payments were made in excess of what was due. They stated that the Plaintiffs had on several occasions made default in paying their accounts, and they did not punctually pay bills when due; that the Plaintiffs were still in money difficulties, and were unable and afraid to come to a settlement of accounts with the Defendants, and to avoid so doing were making untrue allegations and improperly withholding their engineer's certificate for works done from the 25th of April to the 8th of August, 1874. And they further stated that the company had put them to great inconvenience by refusing to register transfers of the shares assigned to them as part payment for work done under the contract; and that there was still owing to them about £30,000 for these works.

The case now came on upon motion by the Plaintiffs that the Defendants might be restrained by injunction from presenting any petition to wind up the Plaintiff company.

Mr. *Higgins*, Q.C., and Mr. *Grosvenor Woods*, for the Plaintiffs:—

This is one of those cases in which a winding-up order may do the most serious injury to a company which is perfectly solvent and able to pay all just claims against them. Their capital consists of £350,000 paid up upon the shares. They have a valuable concession from the Spanish Government for the construction of waterworks at *Cadiz*, and there is every prospect of a favourable result. The Defendants were the contractors for the waterworks, and they have already received, as they themselves admit, no less than £203,000 in cash and £47,790 in shares. We say they have received a much larger amount. After they had exceeded the period specified by the original contract for completion of the works, the company found it necessary to advance them money to continue the works, but even then they failed to perform the contract. This necessitated some step on our part in order that we should not lose the benefit of our concession, and after some negotiation it was arranged that we should take possession of the works and complete them on our own account. In the course of these transactions money was paid by the company in excess of the contract price, and, as we say, sums were paid to the contractors for works which were not properly performed by them. They, on the contrary, make claims against us, which claims, when they come to be inquired into, may or may not prove to be well founded; but under any circumstances there is a fairly contested debt, and money is claimed from us which, upon the plain facts stated, we are fully justified in disputing. How, then, can the Defendants take advantage of the powers given under the *Companies Act*, 1862, to compel us to pay a disputed debt? We are willing to submit the question between us to arbitration, or the Defendants can bring their action against us for the amount, and whatever may be found due from us we are ready to pay.

There was a precisely analogous case before the Lords Justices in June last, *Ex parte Rowan* (1). That was an appeal in bankruptcy. A creditor had sued out a debtor's summons for £3168, alleged to be due to him from a merchant named *Kiddell*, who swore that he was not indebted to that amount, but admitted that

(1) Law Rep. 9 Ch. 617.

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he was indebted to the amount of £650. The Registrar dismissed the summons, but Lord Justice *James* thought it was sufficient to allow the summons to stand over until the debt should be established by an action at law. He agreed with the Registrar in thinking that where there was a *bonâ fide* dispute between the parties as to the amount of the debt it was not necessary to require security. He therefore made an order staying the proceedings without security.

Where there is a *bonâ fide* dispute as to a debt, and the company is solvent, the Court will not make an order for winding up, but will dismiss the petition as a matter of course. This was done by the Master of the Rolls in a recent case of *In re London and Paris Banking Corporation*, where His Honour said there was a *bonâ fide* dispute as to the alleged debt, and there was evidence that the company was solvent, and under such circumstances he could not make a winding-up order. He was further of opinion that the petition was not presented with the view of winding up the company, but for the purpose of compelling them to pay the Petitioner's demand, and he dismissed the petition with costs. The same thing is being done here. The Defendants are merely alleged creditors of the company, and are presenting this petition in order to get payment of a debt which we properly assert is not owing. As soon as the debt is established, then the Defendants may make a demand for the money, and if it is not paid they may present a petition to wind up.

This is a stronger case than *In re Brighton Club and Norfolk Hotel Company* (1). There it was admitted that a large sum was due, but the amount was disputed, and the Master of the Rolls (Lord *Romilly*) said he should not make an order to wind up unless it was shewn that there was no *bonâ fide* dispute or that the company was insolvent, one or the other. Lord *Romilly* there observed that the experiment was novel, and if he acceded to the application the consequence would be very serious to public companies. The meaning of the Act was that if a debt above £50, which was not *bonâ fide* contested, was not paid or arranged within three weeks after demand, then the Court might order the company to be wound up. It was not sufficient for a company to say they

(1) 35 Beav. 204.

disputed the debt; they must shew some reasonable ground for doing so. He then said that the evidence in the case clearly established that there was a contested question of account between the company and the Petitioner. If he made the order, all he could do was to have the account taken between the parties, and he would thus be taking complicated and contested accounts between solvent persons under the powers of an Act of Parliament which meant to do nothing but to wind up insolvent companies and to make them pay their debts so far as their assets would extend. Far from being insolvent, the company was carrying on a thriving business, which the Court was asked to stop merely because there was a quarrel between the company and their contractor as to what was due to him. The petition was consequently dismissed with costs. That is precisely our case upon this motion.

[They also referred to Lord *Redesdale's* book (1) as to the cases in which a Court of Equity would refuse to exercise jurisdiction, by restraining the assertion of doubtful rights in a manner productive of irreparable injury.]

Mr. *J. Pearson*, Q.C., and Mr. *Russell Roberts*, for the Defendants:—

The only question for the Court to decide now is, whether or not at this particular period there is jurisdiction to restrain the Defendant, Mr. *Barnett*, from taking a certain proceeding to recover a debt which he alleges to be due to himself. As to the form or shape our proceedings will take, that is a matter for us to consider whenever we take them.

[The VICE-CHANCELLOR said he should refuse to interfere to restrain the Defendant from bringing an action or taking proceedings to go to arbitration or any mode of recovering the debt except the proceeding by a petition to wind up.]

The question is, whether, when you refuse on principle to grant an injunction against our proceeding by action, you can also, upon principle or upon authority, restrain us from taking this other proceeding upon petition. The Court cannot prevent us from presenting a petition to wind up subject to the liability which

(1) Page 133.

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every person falls under of paying the costs if he is wrong. The evidence in the case on behalf of the Defendants goes to shew that owing to the conduct of the Plaintiffs we were delayed in the execution of our contract. The evidence denies all the statements in the bill as to complaints being made of the manner in which the works were carried out, and as to payments having been made to us in excess of the work done. Then, by stating, as we do, that the Plaintiffs are not in a position to pay their debts, we, in fact, allege the insolvency of the company. We shew upon our affidavits that there is still owing to us about £30,000 for the works done under the contract, and there is, at any rate, sufficient evidence to prove that a large sum is still due to us. We have a right, therefore, to demand payment of that money, and if payment is refused, then we have a right to present a petition for winding up. The Court cannot prevent us from taking this course upon the mere unsustained allegation that the debt is disputed. The Defendants are large shareholders in the company as well as creditors, and if they can bring forward evidence upon their petition that the company is insolvent, the Court cannot avoid making a winding-up order. Under the 1 & 2 Vict. c. 110, s. 8, every person who claims a debt from another has a right to serve him with a notice for payment of the debt, and unless he takes certain proceedings specified in the Act, then he is liable to be declared bankrupt. That is exactly the same proceeding here.

Applications like the present have frequently been made to the Courts, and have been refused. In the case of *Pim* v. *Wilson* (1), which was to restrain proceedings in bankruptcy, the Lord Chancellor said the Legislature had chosen to give a creditor different modes of proceeding. If a creditor was proceeding by action it was perfectly plain that this Court could not restrain the action, and there was no difference in that case. There was a statutory enactment, and inasmuch as the Legislature had chosen to give that particular remedy, it was not for the Court to interfere. The case of *Attwood* v. *Banks* (2) was there referred to, which was also a motion to restrain a creditor from taking proceedings in bankruptcy under the statute 1 & 2 Vict. c. 110, and that case shewed exactly under what circumstances the Court would interfere.

(1) 2 Ph. 653. (2) 2 Beav. 192.

There the motion was granted for this reason—not because the Court would restrain the proceeding in bankruptcy where a debt was merely disputed, or where the proceeding might do irreparable injury to the debtor, but because there was an agreement between the debtor and the creditor which made it inequitable that he should take any proceedings whatever. In the case of the *London and Paris Banking Corporation*, cited by Mr. *Higgins*, it appears that the money was brought into Court, and that is what the Plaintiffs ought to do in this case, but their only equity is that the debt is disputed, and on that ground alone they ask the Court to prevent Mr. *Barnett* from taking those proceedings which the Legislature says he is entitled to take if he is not paid. If this were a motion to restrain an action at law upon a bill of exchange, and the defence was that the debt was disputed, the Court would say, Shew me a *bonâ fide* ground for disputing the debt; and, upon that being shewn, then the action might be restrained, but only upon payment of the money into Court. Every man who alleges that his neighbour owes him a debt has two ways of proceeding for the recovery of his debt—he may bring a simple action, or he may take out a debtor's summons under the *Bankruptcy Act*. If, in the latter case, he is defeated and proves no debt, he may have done irreparable damage to the man against whom he issues the summons, but that individual has his remedy, for he may bring an action for malicious proceedings against him and recover damages. So in the same way with regard to a company. There are two modes provided by the Legislature. If you have a claim against a company, you have a right to prosecute it by means of an action; but if you have any doubt of their solvency, you are entitled to serve them with the statutory notice to pay your debt, and if they do not pay it, they must submit to be wound up. If, when the petition comes on, the debt is not proved, then the petition will be dismissed with costs. If such a proceeding is taken maliciously, and without any fair or honest cause, the company would have an action for damages against a person who proceeded in that way. But the company has no right to come here and ask the Court in the first instance to say that the Defendant is not entitled to take those proceedings which the Legislature says he is entitled to take. The Court cannot

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restrain such a proceeding, because it may think that the presentation of such a petition may do an injury to the company. In the *Lancaster and Carlisle Railway Company* v. *North-Western Railway Company* (1), a bill was filed to restrain an application to Parliament. This was opposed on the ground that it was contrary to public policy, and that the agreement entered into between the parties not to apply to Parliament was void. The injunction was refused in that case.

If this motion succeeds, any company may meet the claims brought against them by filing a bill to restrain proceedings under the *Companies Act*, and getting an affidavit stating that the debt is disputed. We shew by our evidence that this is not a *bonâ fide* dispute. We shew from the full accounts set out that there is a sum of at least £30,000 due to us, and the only way in which it is met is by saying that if the accounts were taken there would be a different complexion put upon the facts; but this is no answer to the clear statement made by us, and the whole question can be as well settled in a winding-up as by any other proceeding taken by us for the recovery of our debt.

SIR R. MALINS, V.C.:—

The *Cadiz Waterworks Company*, who are the Plaintiffs in this case, is a company which was incorporated in 1871 for the purpose of supplying the city of *Cadiz* with pure water. In order to obtain that object it was necessary to construct very extensive works. The Defendants, *Barnett & Gale*, who were contractors in a very large way of business, entered into a contract to construct the necessary works for the waterworks of *Cadiz*, in consideration of sums of money which may be stated roundly at £290,000, of which a large proportion was to be paid in money and the residue in shares. It appears by the statements on this bill, and it is proved by the affidavits of the Plaintiffs, and not disproved by the affidavits of the Defendants, and indeed expressly admitted, that under that contract the company have paid £203,143 in cash and £47,000 and a fraction in shares, making in round numbers £250,000 actually paid under this contract. In the course of the work those sort of disputes have arisen which are very common

(1) 2 K. & J. 293.

between persons employing contractors and the contractors. It has been said, and I am afraid with some truth, that the contractors have been very much in default, that they were short of money, that they did not pay their workmen regularly, that the company was accordingly obliged—and it is distinctly sworn—to take upon themselves payments, and to make payments, which the contractors ought to have made, that the contractors were behind in point of time, and have been guilty of very considerable default in the execution of the works. On the other hand, it is said, as is usual in such cases, with regard to the default, "Although we admit it has taken place, it has been caused by your default in not putting us in possession of the land through which we were to put the pipes to conduct the water to *Cadiz* in due time, and although there may have been defaults, they are attributable to you, and not to us." Thus say the contractors. The result is that the contractor, Mr. *Barnett*, says (because Mr. *Gale* is now out of the firm) there is a large sum of money, in round numbers about £30,000, due to me. The company say, on the contrary, he is considerably overpaid, and if a proper account is taken between them, it will be shewn, instead of his having to receive money, he will have to pay money to the company. Now, I think this is a case in which Mr. *Barnett* believes money is due to him. I think the company and its directors believe that he is overpaid. There being, therefore, this dispute between them—where one side believes that the other has been overpaid, and the other believes he has a large sum of money to receive—that, I think, may be properly described as a *boná fide* dispute as to the amount of the debt. It is thoroughly settled now that on a petition to wind up no order can be made until the debt is proved where there is a *boná fide* dispute as to its existence. If Mr. *Barnett* is right, the tribunals of the country are open to him; he can bring an action; he has a contract which entitles him to drive the company to arbitration, or he may file a bill in this Court to force the company to an account, such as was made in *McIntosh* v. *Great Western Railway Company* (1) and many other cases of that kind, in which it was thoroughly settled that this Court would entertain such a bill for an account of works done by the contractor under such a contract as this.

(1) 3 Sm. & Giff. 146.

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Therefore there are at least three remedies open to him—action at law, arbitration, or bill in equity, which is the simple remedy for a debtor whose debt is disputed. It is said he has a fourth remedy, and that is the one with which he seems to be enamoured, namely, a petition to wind up the company; and the only question I have to decide here is whether, under these circumstances, he ought to be permitted to present a petition to wind up the company while the three other remedies are open to him. Now, I beg to say that my interpretation of the *Companies Act* is that it is not a remedy intended by the Legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist—solvency and a disputed debt. It has been attempted to prove to me that there are not only allegations but proofs of insolvency here. I heard every word of the affidavits read, and I am very glad to find that neither Mr. *Barnett* nor anybody connected with him has ventured to say that this company is insolvent. I think it would have been a gross misrepresentation if he had said so; to his credit he has not, and I am satisfied it is a solvent company. Therefore, the company being solvent, and there being a *bonâ fide* dispute as to the debt, what injury am I doing Mr. *Barnett* by restraining him from presenting a petition to wind up. If he presented such a petition, and it came before me, it would be my duty to dismiss it with costs, because, although a petition may be presented when the creditor does not know that the debt will actually be disputed, if it turns out after the presentation of the petition that it is disputed, that is a ground for ordering the petition to stand over till the debt is proved. But if a man will be so absurd as to present a petition to wind up when he has distinct notice that the debt is disputed, and the circumstances shew that it is *bonâ fide* disputed, and also when he knows that the company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the Court under those circumstances would be, not to suspend the petition, but absolutely to dismiss it with costs. And I beg to express my opinion that this Court ought not, and I think will not—at all events I will not until I am controlled by higher authority—permit this winding-up process to be made a vehicle of oppression. What is Mr. *Barnett's* object? He must

have some sinister object. The arguments surprise me that have been addressed to me. What is the result, suppose I allow him to go on to present a petition to wind up? How will it advance his case? When the petition comes on it would be dismissed. How should it be settled? Even if it is not dismissed with costs, as it would be, what would be done with the petition? It would be ordered to stand over until proof of the debt claimed from the company. And how can it be proved? Not in a petition for winding-up, but some other mode—action, suit in equity, or arbitration. What does he do? He thinks if he can make it public, if he presents this petition, that it will be so injurious to the company that, rather than submit to it, they will settle with him. Cases have been cited to shew that this Court will not interfere with serving a debtor's summons, and will not interfere with various other processes; but a winding-up is a totally different thing. How does it begin? Petition presented, then advertised in the *London Gazette*, from the *London Gazette* copied into a great number of newspapers which have a large circulation in *England*, and I suppose also in *Spain*. What is the result? Here is a company perfectly solvent, which has a fair prospect, as far as I have heard, of being successful, and you have it advertised in every paper in *England* that there is a petition presented to wind them up, a petition which it must be known perfectly well to the petitioner never can succeed. For what purpose is it presented? Why, simply because the petitioner thinks he will by such means obtain his demand—and, for all I can see, it may be a very unjust demand. I give no opinion, and I have none, whether he is right or they. I give them both credit for believing themselves right, but this is certainly not the proper mode of settling such a dispute; which never can be settled by means of a petition to wind up. Therefore, all the cases that have been cited—the case of *Pim* v. *Wilson* (1), for instance, which was merely a summons under the 1 & 2 Vict. c. 110, where there is no advertising, no personal injury done—have no application to this case, which is one of winding up. The petition for winding-up is not to be made the means of bringing about the collateral purpose, and therefore this Court has

(1) 2 Ph. 653.

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always acted on principle; if it sees a petition to wind up presented, not for a *bonâ fide* purpose of winding up the company, but for some collateral and sinister object, on that ground it will be dismissed with costs. I have had several cases before me of that sort, and I have never done otherwise than dismiss such petitions with costs. The case of *Attwood* v. *Banks* (1) has no application, for the same reason. The case of *Ex parte Rowan* (2), I am very much disposed to think, has some application to this case, because there the Court certainly condemned the presentation of a summons in the Court of Bankruptcy to enforce a debt for a large amount where it was well known a much smaller amount was due. I think this case does fall within the rule laid down by Lord *Redesdale* in the passage referred to, that the object of this Court is to restrain the assertion of doubtful rights in a manner productive of irreparable damage. I am satisfied that in this case the presentation of a petition may be productive of irreparable damage to this company. The bill states it will be so. The company has already been injured by the default and delay of the contractor in carrying out these works. He has prevented the company, therefore, from yet earning any dividend, and the presentation and advertisements of a petition to wind up the company will be very injurious to their credit and prospects. I believe if it were advertised in the Spanish newspapers, people in *Spain* would not understand it, and many people in *England* would not understand it; but the advertising such an application would, in my opinion, inflict irreparable injury on the Plaintiffs, while at the same moment it could not possibly do the Petitioner, the Defendant *Barnett*, the slightest good. The last case on this subject was the one before the Master of the Rolls, *In re London and Paris Banking Corporation*, only noted at present in the *Weekly Notes*, where this kind of case arose. The Petitioner claimed against the *Paris Banking Corporation* for a debt of £200. They admitted they owed him something, but not £200. They did not pay £200 into Court, as it has been argued they were bound to do whatever the demand was, but they paid a smaller sum into Court, the sum which they considered they owed. Nevertheless this hungry

(1) 2 Beav. 192. (2) Law Rep. 9 Ch. 681.

creditor would go on with the petition to wind up, because by such a petition he thought he could embarrass them, and thus oblige them to submit to an unjust demand, whereas by the ordinary process of an action at law he could not do so. How was it dealt with by the Master of the Rolls? He said "that there was in this case a *bonâ fide* dispute as to the debt, and evidence that the company was solvent, and under these circumstances he could not make a winding-up order; further, he was of opinion that the petition was not presented with the view of winding up the company, but for the purpose of compelling them to pay the petitioner's demand;" and he dismissed the petition with costs. So in this case, I am satisfied, first, that the company here is solvent; secondly, I am satisfied that there is a *bonâ fide* dispute with regard to the debt; and, thirdly, I am satisfied that Mr. *Barnett's* object is not the *bonâ fide* purpose of honestly compelling the payment of his debt, but for the purpose of making an unjust attempt to compel them to submit to an unjust demand. If there were now a petition to wind up before me I should dismiss it with costs; and if I had the power, as between solicitor and client. I have no power of dealing with costs now, but the application is, in my opinion, so clearly founded on principle, that I accede to it. I do not in the slightest degree interfere with the right to bring an action, or file a bill; but on this application I restrain him from presenting any petition to wind up this company.

Solicitors for the Plaintiffs: Messrs. *G. S. & H. Brandon.*
Solicitor for the Defendants: Mr. *H. W. Trinder.*

V.-C. M.
1874
Dec. 8, 9.

WILDES *v.* DUDLOW.

[1868 W. 141.]

Promissory Note—Verbal Promise of Indemnity—Statute of Frauds—Liability undertaken at the Request of Another.

A., at the request of and on a verbal offer by *B.* to indemnify him against loss, joined with *C.* in a joint and several promissory note which he was afterwards compelled to pay :—

Held, that the offer to indemnify *A.* was not an agreement within the *Statute of Frauds*, and, therefore, need not be in writing, and that *A.*, having afterwards become the executor of *B.*, was entitled to retain the amount paid by him on the note as a debt due to him from *B.*'s estate.

JOHN DUDLOW, by his will, dated the 24th of April, 1852, after directing that all his debts should be first paid, and giving a legacy of £1200 to his daughter *Frances*, the wife of *Henry Atkinson Wildes*, gave to each of her daughters, the Plaintiffs, who were five in number, £500 sterling, and to her son, *Henry Dudlow Wildes*, £200 sterling, and after making certain other gifts he gave to his daughter *Anne Dudlow* £4000 sterling over and above a sum of £300 then in his hands belonging to her, and the free use and occupation of the premises where she resided for eighteen months after his death, unless she and her brother *John Noble Dudlow* should come to a satisfactory arrangement for quitting possession sooner, and he charged the payments and legacies upon his real estate, and he constituted his son *John Noble Dudlow* his residuary legatee, and appointed him and *Henry Dudlow Wildes* his executors.

The testator, by a codicil to his will dated the 22nd of January, 1853, gave the occupancy of the house he then resided in to his daughter *Anne* for life under certain conditions, and increased her legacy to £5000, and declared that the legacies bequeathed to his daughter *Anne* by his will and codicil should be paid to her in full, and in preference to any other legacies by him given, and not be subject to any marshalling of assets in case such a course should become necessary.

The testator died on the 9th of March, 1854, and his will was

proved by *John Noble Dudlow* and *Henry Dudlow Wildes*. When the estate came to be realized the executors satisfied themselves that it was insufficient in amount to pay the legacies in full.

The Plaintiffs then took out a summons to vary the Chief Clerk's certificate, one question raised being as to a sum of £1000 which *John Noble Dudlow* claimed to charge against the testator's estate under the circumstances stated as follows in the 28th paragraph of the answer of the executors:—

"Moreover, upon the said bankruptcy of the said *Henry Atkinson Wildes*, I, *John Noble Dudlow*, was compelled to pay a sum of £1000 due upon a joint and several promissory note made by me and the said *Henry Atkinson Wildes* under the following circumstances:—In or about the year 1853 the testator, who had often assisted the said *Henry Atkinson Wildes* in raising money, requested me, *John Noble Dudlow*, to join the said *Henry Atkinson Wildes* in a note for £1000, saying "that he, the said testator, did not like his (the said testator's) name going so often to *Randell & Co.*" (the bankers of the said testator), "from whom the said *Henry Atkinson Wildes* intended to raise the said sum, or words to that effect, and offering to indemnify me from any loss that might arise from my joining in the said note. Under the circumstances aforesaid, I, *John Noble Dudlow*, consider myself entitled to recoup myself out of the testator's estate for the said sum of £1000, and I submit whether I am liable to account for the same."

Mr. *Glasse*, Q.C., and Mr. *Herbert Smith*, for the Plaintiffs:—

This is an attempt to set up an agreement by one to become liable for the debt of another not in writing, and therefore void by the *Statute of Frauds*: *Mallet* v. *Bateman* (1); *Green* v. *Cresswell* (2); *Cripps* v. *Hartnoll* (3).

Mr. *Higgins*, Q.C., and Mr. *Grosvenor Woods*, for the Defendant *Dudlow*:—

There may be some conflict of authority on the question whether the *Statute of Frauds* can be pleaded in opposition to this claim,

(1) Law Rep. 1 C. P. 163. (2) 10 A. & E. 453.
(3) 31 L. J. (Q.B.) 150.

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but the latest decisions have overruled those which seemed to bring such an agreement within the *Statute of Frauds*. The first decision adverse to the view of the Plaintiffs was *Thomas* v. *Cook* (1). It was followed in *Eastwood* v. *Kenyon* (2) and in *Fitzgerald* v. *Dressler* (3); and lastly, in *Reader* v. *Kingham* (4), which is very nearly like the present case, and has not been affected by any subsequent decision.

Mr. *Glasse*, in reply:—

Mr. Justice *Blackburn's* remarks in *Mountstephen* v. *Lakeman* (5) shew that *Reader* v. *Kingham* is not considered to have overruled *Green* v. *Cresswell* (6), though *Lakeman* v. *Mountstephen* may not itself be an authority, having been afterwards taken to the House of Lords (7).

SIR R. MALINS, V.C.:—

The question is, whether this contract is, within the 4th section of the *Statute of Frauds*, required to be in writing. The words of that clause are, "charge the Defendant upon any special promise to answer for the debt, default, or miscarriage of another." What was the promise made by the testator in this case to the Defendant *John Dudlow*? It was not, "I engage with you to be answerable to you for the debt of *Wildes*," because *Wildes* did not owe *Dudlow* anything, but he says, "If you will do a certain act, namely, render yourself liable for that debt, I will indemnify you." I think it perfectly clear that the only contract which I have to consider is, that between father and son. It is not that he will pay the debt of *Wildes*, but that if the son will guarantee *Wildes'* debt, he will see him harmless, or, in other words, indemnify him. If one man could induce another to alter his line of conduct in that way, and then meet him with the *Statute of Frauds*, that statute, instead of being a protection against fraud, would be the direct means of fraud. The statute enacts that if one man promises to pay the debt of another the

(1) 8 B. & C. 728.
(2) 11 A. & E. 438.
(3) 7 C. B. (N.S.) 374.
(4) 13 C. B. (N.S.) 344.
(5) Law Rep. 5 Q. B. 613.
(6) 10 A. & E. 453.
(7) Law Rep. 7 H. L. 17.

promise is void unless it is in writing, and no one doubts that to be the law; but it appears to me, upon principle, so plain that the present case is not within the statute, that I am very glad to find that what occurred to me as being the proper view of the case is finally decided to be the law on the subject. There has been a conflict of authority, and I confess I am surprised to find that there has been so much conflict. The point was originally decided by two of the most eminent Judges known on the bench (Mr. Justice *Bayley* and Mr. Justice *Parke*, afterwards Lord *Wensleydale*) in the case of *Thomas* v. *Cook* (1), and they decided it upon the plainest principles of common sense and justice. I was therefore surprised to find that in a later case of *Green* v. *Cresswell* (2) the same Court, constituted at that time of other Judges, had taken a different view, and a view which, if it had been maintained, I possibly should not have felt myself obliged to follow. But I am happy to find that, the matter having been most carefully and elaborately considered in the case of *Reader* v. *Kingham* (3), when the full number of Judges was present, the case of *Green* v. *Cresswell* was overruled, and the law as laid down by *Thomas* v. *Cook* restored. The learned Judges commented upon those cases, and said that the law was accurately laid down in *Thomas* v. *Cook;* and I entirely agree in that expression of opinion. I accordingly decide that where one person induces another to enter into an engagement, by a promise to indemnify him against liability, that is not an agreement within the *Statute of Frauds*, and does not require to be in writing. This is a case in which a father induced his son to guarantee the debt of his son-in-law upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him; and I think, therefore, that the son is perfectly right in helping himself out of the estate which has come into his hands. The force of the decision in *Reader* v. *Kingham* was somewhat shaken by the opinion expressed by Mr. Justice *Blackburn* in *Mountstephen* v. *Lakeman* (4); but, as the decision of the Queen's Bench in that case was reversed in the Exchequer Chamber (5), and also in

(1) 8 B. & C. 728.
(2) 10 A. & E. 453.
(3) 13 C. B. (N.S.) 344.
(4) Law Rep. 5 Q. B. 613.
(5) Law Rep. 7 Q. B. 196.

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the House of Lords (1), the law rests on the plain and reasonable ground upon which it was put in *Reader* v. *Kingham* (2). The decision is, therefore, entirely in favour of the Defendant; and I hold that the Chief Clerk has done perfectly right in allowing this £1000 with interest. Therefore the motion to vary the certificate in that respect must be dismissed with costs.

Solicitors: Messrs. *Clabon & Fearon*; Mr. *W. Compton Smith*.

V.-C. M. 1874 Dec. 19.

In re DIMSON'S ESTATE FIRE-CLAY COMPANY.

Company—Winding-up—Judgment—Liberty to issue Execution refused—Companies Act, 1862, *ss.* 87, 163.

7 Ch. D. 372. 8 Ch. D. 617. 14 Ch. D. 168

A creditor of a company, whose debt was incurred by giving acceptances on their behalf, having obtained judgment against the company after the presentation of a petition, but before the order for winding up, was refused leave to enforce execution upon his judgment, although the Court was of opinion that he had been hardly dealt with by the company; but the costs of the application and of the action were given after the costs of the official liquidator.

THIS was an application upon an adjourned summons in the winding-up of the *Dimson's Estate Fire-Clay Company*, that *Samuel Lake*, a judgment creditor of the company, might be at liberty to enforce execution upon a judgment obtained in the Court of Queen's Bench on the 3rd of May, 1874, against the company, to recover the sum of £382 5*s.* 2*d.* damages, and £42 11*s.* 2*d.* costs.

Samuel Lake was the owner of fifty ordinary shares, and from the time the company commenced business, in May, 1872, to the end of September, 1873, he was the local manager of the company. Early in that month he accepted drafts of the company to the extent of £382 5*s.* 2*d.*, this sum being the balance owing under a contract for the supply of certain barges which had been built for the company and had been ordered by *Lake* at their request and direction. Mr. *Lake*, having been unable to obtain payment of the debt incurred on behalf of the company, brought

(1) Law Rep. 7 H. L. 17. (2) 13 C. B. (N.S.) 344.

an action against them in January, 1874, which was delayed by the defence of the company, and judgment was not obtained till the 3rd of May. Execution was issued on the 7th of May. On the 21st of April a petition for winding up the company was presented by Mr. *Gordon*, the manager, and a second petition was presented on the 1st of May by a creditor having no official connection with the company.

The order for winding up was made on the 8th of May, 1874, upon both petitions, the applicant, Mr. *Lake*, being represented by counsel, and consenting to the order.

Mr. *T. A. Roberts*, in support of the application:—

This is a case in which the Court is fully justified in exercising the discretion conferred by the 87th and 163rd sections of the *Companies Act*, 1862. Mr. *Lake*, the applicant, was the local manager of the company, he was directed by them to make arrangements for the purchase of barges. It was with their sanction and approval that he entered into the contract, under which he was bound to pay a large sum of money. The directors admitted their liability, and even paid a portion of the purchase-money, and it was with Mr. *Lake's* money that the company obtained this property. Technically, the barges form part of the property of the company, but in point of fact they belong to Mr. *Lake*, since he purchased them and paid for them. It is, therefore, in respect of his own property that he was forced to bring the action. The action was commenced so far back as January last, and if the company had not unwarrantably delayed the proceedings at law, Mr. *Lake* would have obtained his judgment long before the winding-up of the company had been commenced. In such a case as this, where there could be no possible defence on the part of the company, they ought at once to have allowed judgment to go; instead of which they permitted costs to be incurred which have materially increased the debt owing to Mr. *Lake*. But even with all these obstacles we are but a very short time too late. There can be no doubt that the petitions for winding up were presented for the express purpose of defeating our just claims, and under such circumstances it is but just and fair that we should be allowed to proceed with our execution.

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This case is in all respects like that of *In re Bastow & Co.* (1), where your Honour refused to stay proceedings under an execution. There the petition to wind up was presented on the 27th of June, and judgment was obtained on the 1st of July, and execution issued on the 2nd of July. This is a case of much greater hardship than that. The case of *In re Bastow & Co.* was followed by your Honour in *In re Imperial Steam and Household Coal Company* (2), where the sheriff entered under a *fi. fa.* two days after the petition for winding up was presented. That case was treated as identical with *In re Bastow & Co.*, and an *ex parte* injunction to restrain execution was discharged with costs.

In both these cases the execution was after the presentation of the petition, and they shew that if a special case can be made out, the Court will allow the execution creditor, notwithstanding the winding-up, to have the fruits of his judgment. In the case of *In re Great Ship Company* (3) the creditor, Miss *Thorne*, was restrained from the advantage of a priority because she was amply secured by a guarantee of the directors, and it would have been the directors who would have reaped the benefit of her being allowed that priority; and in *In re Exhall Coal Mining Company* (4) a landlord who had demised a colliery to trustees for a company was allowed to proceed with a distress, and to sell the goods of the company upon the premises, notwithstanding that a petition had been presented for winding up the company.

Mr. *Glasse*, Q.C., and Mr. *Beale*, for the official liquidator, referred to *In re London and Devon Biscuit Company* (5), where execution was stayed because the writ was not put in force until three hours after the presentation of the petition for winding up; and to *In re London Cotton Company* (6), where execution would have been put in force before the winding-up but for the sheriff having been prevented from taking possession by the door being shut in his face. If it had not been for that fact, the Vice-Chancellor would not have allowed the judgment creditor to have the benefit of his execution; and in *Ex parte North Staffordshire*

(1) Law Rep. 4 Eq. 681.
(2) 37 L. J. (Ch.) 517.
(3) 33 L. J. (Ch.) 245.
(4) 33 L. J. (Ch.) 595.
(5) Law Rep. 12 Eq. 190.
(6) Ibid. 2 Eq. 53.

Railway Company (1), a creditor was refused the benefit of his judgment.

They were then stopped by the Court.

Mr. *Romer* appeared for the Petitioner on the second petition.

SIR R. MALINS, V.C.:—

This is an application by Mr. *Samuel Lake*, a judgment creditor of this company, for leave to avail himself of the execution obtained by him on the 3rd of May last in the Court of Queen's Bench. Mr. *Lake* was the local manager of the company, and was a creditor for £382 11*s.* 2*d.*, in consequence of having accepted bills for the purpose of carrying on the business of the company. The action was commenced in January last, and was pending in the month of April, when two petitions were presented for winding up the company, that is, one on the 21st of April and the other on the 1st of May.

The action was tried and judgment obtained on the 3rd of May, when liberty was given to issue execution in four days, and, consequently, execution was issued on the 7th of May. Both petitions to wind up came on for hearing upon the 8th of May, when the usual order for winding up was made. I am also told that counsel appeared on that occasion for Mr. *Lake*, and consented to the order, and had his costs allowed. Now the winding-up process commenced, in fact, on the 21st of April, when the first petition was presented; therefore the judgment obtained on the 3rd of May was a fortnight after the winding-up process commenced. The object of the *Companies Act* is, that there shall be an equal distribution of the assets amongst all the creditors of a company; but in any case where there has been an attempt unjustly to wind up a company for the purpose of defeating creditors, then the Court has said that any particular creditor who has been unjustly treated shall be at liberty to pursue the remedy in his hands notwithstanding the order for winding up. This was done in the case of *In re Bastow & Co.* (2); and if in this case the company had unjustly and improperly delayed the action, then it would have come within *In re Bastow & Co.*, and I could have exercised

(1) Law Rep. 19 Eq. 60. (2) Law Rep. 4 Eq. 681.

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jurisdiction under the 87th and 163rd sections of the *Companies Act*, 1862. Those two sections, it has been decided, must be read together, but the discretion given by that Act must be exercised with due regard to all parties concerned. If this winding-up order had been made upon the petition of *Gordon* only, I should then have treated it as the petition of the company. But there was another petition presented by an independent creditor of the company before judgment was obtained, and there is no evidence to shew that in the presentation of that petition there was any collusion with the company, so that I must take it that the petitioner was an independent creditor.

Now, what is the duty of the Court in all these cases? I consider that my duty is to see that there is an equality of equities. Mr. *Lake* says that he has been badly treated by the company because the barges had been purchased with his money, and he was only seeking to issue execution upon his own property; but if you take the case of a bankruptcy, there it would be the same thing, since the property would be in the order and disposition of the bankrupt, and would pass to his assignees. Therefore, the mere fact of *Lake's* having paid for the barges, does not, in my opinion, make any difference. Nor can I think there has been that amount of unfairness on the part of the company which has been urged against them. I very carefully considered the question which arose in *In re London and Devon Biscuit Company* (1), where the writ of execution was placed in the hands of the sheriff three hours only before the petition was presented for winding up the company; but possession of the property was not taken by the sheriff until three hours after the presentation of the petition. There I held that execution was not "put in force" within the meaning of the 163rd section of the *Companies Act* until possession was actually taken, and as the object of the winding-up was to secure a *bonâ fide* distribution equally among all the creditors, I thought there was no ground for exercising the discretion of the Court, and I acceded to a motion to stay proceedings under the writ of execution. Therefore, although I am inclined to think that Mr. *Lake* has, in some respects, been hardly dealt with, and there are many considerations in his favour, on the whole there

(1) Law Rep. 12 Eq. 190.

has not been such a combination of circumstances as entitle me to interfere in his behalf.

But although I feel bound to refuse the application, I shall not dismiss it with costs. I think the proper order will be that Mr *Lake* shall have his proper costs in the winding-up, but he must stand behind the official liquidator, who will be entitled to his costs in the first place. After those costs are paid, then Mr. *Lake* will be entitled to his costs of this application, and also the costs incurred by him in the action, which I am of opinion ought never to have been defended by the company. They ought to have allowed the judgment to go without opposition.

Solicitor for the Applicant: Mr. *H. N. Capel.*

Solicitors for the Official Liquidator: Messrs. *Mathews & Mathews.*

Solicitors for the Company: Messrs. *Renshaw & Rolph.*

WARD *v.* BEETON.

[1874 W. 253.]

Copyright—Use of Name—Employer and Agent—Injury to Employer's Property—Injunction.

The Plaintiffs had purchased the copyright of and the right to use the name of the Defendant in the publication of a work called "*Beeton's Christmas Annual*," and the Defendant agreed to give his whole time to the service of the Plaintiffs, and not to engage in any other business:—

Held, that the Defendant must be restrained from advertising a rival work.

THE Plaintiffs, Messrs. *Ward & Lock*, were publishers and booksellers, and carried on business under the style of *Ward, Lock, & Tyler* down to the month of June, 1873, when *Tyler* retired from the firm.

The Defendant, *Samuel Orchart Beeton*, was, down to the year 1866, in business as a publisher and bookseller, and was the proprietor of various books, and in particular "*Beeton's Christmas*

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Annual," which was then in its seventh year of publication. In 1866 the Defendant entered into an arrangement with his creditors, under which the Plaintiffs purchased the whole of his copyright, stock-in-trade, and business property. In the month of February, 1869, an agreement was entered into between the Plaintiffs and the Defendant, which was to commence as from September, 1866, and was in the following terms:—First, the Defendant to devote the whole of his time and attention to the development of the publishing and bookselling business of *Ward, Lock, & Tyler*, and under their direction *S. O. Beeton* shall not directly or indirectly engage in any other business or enterprise, or be directly or indirectly interested therein, without the consent of *Ward, Lock, & Tyler*. Secondly, *Ward, Lock, & Tyler* to have the use of *S. O. Beeton's* name for the purpose of their present or future publications, and *S. O. Beeton* not to permit the use of his name for any publication without *Ward, Lock, & Tyler's* consent. In consideration of the services of *S. O. Beeton* and the use of his name as aforesaid, *Ward, Lock, & Tyler* to pay to him a salary as follows: namely, from September, 1866, to July, 1867, at the rate of £400 a year; from July, 1867, to July, 1869, a salary equivalent to one-sixth part or share of the net yearly profits of *Ward, Lock, & Tyler* in their business; from July, 1869, to July, 1871, a salary equivalent to one-fifth of the said profits; and after such period a yearly salary equivalent to one-fourth of such net yearly profits. The agreement further provided, that nothing therein contained should operate as a partnership between the Plaintiffs and the Defendant, and that it should be lawful for the Plaintiffs to put an end to the agreement by giving six months' notice in writing; and also that upon such notice being given the Defendant to have the option of receiving payment from the Plaintiffs of the yearly sum of £500 during his life, on condition that the Defendant should not directly or indirectly be engaged in or interested in, or permit his name to be used in connection with any other publishing or bookselling business, or any publications whatever, other than the *Weekly Dispatch* newspaper, except with the consent of the Plaintiffs, or of electing to be free from any restriction as to the use of his name and as to his being engaged in any other business, in which case the annuity not to be payable;

and in case of the Defendant's death the Plaintiffs to be at liberty to continue the use of his name in connection with their publishing business.

Under the above agreement the said annual, called "*Beeton's Christmas Annual*," had regularly been published by the Plaintiffs up to Christmas, 1873, and the Defendant had contributed to and assisted in such publication. In 1872 the said annual consisted of a production which acquired great notoriety as "*The Coming K——*;" its publication, however, took place under the management of the Defendant without the Plaintiffs having seen the MSS. or having been consulted with regard to certain passages therein contained, and the Plaintiffs refused to have any second edition published.

In 1873 "*Beeton's Annual*," as published by the Plaintiffs, consisted of a production called "*The Siliad*," which was written by the same authors as "*The Coming K——*," being the Defendant, Mr. *Doughty*, and Mr. *Emerson*.

In July, 1874, the Plaintiffs applied to the Defendant to prepare the volume of "*Beeton's Annual*" to be published at Christmas, but desired that the character and contents of it might be different from those of "*The Siliad*," with which they were dissatisfied, but the Defendant neglected to prepare or to assist in preparing the same.

In October, 1874, the Plaintiffs heard that the Defendant was engaged in preparing another annual in opposition to the Plaintiffs; and on the 23rd of that month they wrote to the Defendant, stating that they had received reliable information that he was engaged in getting up a Christmas annual in connection with Mr. *Doughty*, and that he had arranged with Mr. *Weldon* for the publication of the same; that this conduct was doing the Plaintiffs great wrong, and was in direct violation of their agreement; that they should consequently take every means in their power to maintain their rights; and they repeated their request that the Defendant would make proper arrangements for bringing out the Plaintiffs' usual annual. They also required the Defendant to give his attention to other important matters which he had neglected.

On the following day the Defendant answered the letter of the

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Plaintiffs, and stated that they had been wrongly informed as to his being engaged in getting up a Christmas annual in opposition to them. That it was he who had reason to complain of the Plaintiffs' conduct. He had some months before informed Mr. *Lock* of the whole plan he had arranged for the annual of 1874, and he, as well as Mr. *Ward*, had refused to publish it; but as he could not, under his agreement with the Plaintiffs, produce a Christmas annual elsewhere, all the suggestions and plans, which were a material part of such publication, became the property of the authors of the two previous annuals, of which this one was to be the continuation; and these authors being his friends, and unacquainted with publishing, had asked his advice in many things, and he could not refuse to help them; that he had at their request given instructions in connection with it, but there was nothing in this conduct inconsistent with his agreement with the Plaintiffs. He had merely assisted his friends with his advice, but he denied having entered into any arrangement with them as to sharing any profits or losses. He further stated that he could not at a moment's notice, or even a month's, or a quarter's notice, produce some splendid novelty which was to bring in, as the Plaintiffs seemed to expect, a sum of £1200.

As the Defendant still declined to prepare for the Plaintiffs their Christmas annual, the Plaintiffs arranged with one of the authors of "*The Siliad*" to write the annual, and it was announced by advertisement that the forthcoming "*Beeton's Annual*" would be entitled "*The Fijiad.*"

On the 13th of November last there appeared in the public newspapers three advertisements issued by the Defendant, one addressed to the booksellers, another to advertisers, and a third to the public, all of them in the following terms, with only slight variations:—

"It has just come to my knowledge that Messrs. *Ward, Lock, & Tyler* are about to announce the issue of '*Beeton's Christmas Annual*' for this year. My long connection with the trade obliges me instantly to state that I have no hand or concern whatever in this annual. Further, I feel it my duty to state that I devised long ago my usual annual for the season in collaboration with the authors of '*The Coming K——*' and '*The Siliad.*' The title of

the annual now in the press is, '*Jon Duan.*' It is written by the authors of '*The Coming K——*' and '*The Siliad,*' and for reasons not pertinent here to state it will not be issued by *Ward, Lock, & Tyler,* but by *Weldon & Co.,* 15 *Wine Office Court, Fleet Street.*"

The Plaintiffs had also recently discovered that the Defendant had threatened to take legal proceedings against Mr. *Emerson,* the gentleman who was preparing the Plaintiffs' forthcoming annual, and Mr. *Head,* who was to print it, in case they further assisted in bringing out the Plaintiffs' book, and had stated to them that his connection with the Plaintiffs had terminated.

The Plaintiffs alleged that this last statement was untrue, since there had been no termination of the agreement of the 13th of February, 1869. They also alleged that the Defendant had a direct pecuniary interest in the enterprise of bringing out the annual entitled "*Jon Duan,*" and that such profits ought to be accounted for to the Plaintiffs during the pendency and operation of the said agreement.

The bill prayed that the Defendant might be restrained by injunction from publishing, issuing, or circulating any such advertisements, circulars, or letters as aforesaid, containing any statement or representation that the Defendant is interested or concerned in any annual, book, or publication, other than "*Beeton's Christmas Annual*" so published from year to year by the Plaintiffs, or that the Defendant's connection with the Plaintiffs' firm is terminated, or that the use of the Defendant's name by the Plaintiffs for the purposes of their said "*Beeton's Christmas Annual*" is improper or unauthorized. That the Defendant might be ordered to account for all profits made by him from or by means of the said annual called "*Jon Duan,*" and that such profits might be applied under and in accordance with the agreement of the 13th of February, 1869. And that the Defendant might be ordered specifically to perform the said agreement, the Plaintiffs being ready and willing to perform the agreement on their part. That the Defendant might be ordered to pay to the Plaintiffs due compensation, in the nature of damages, for his wrongful conduct therein complained of, and that he might be ordered to pay the costs of the suit.

An injunction was applied for on the 24th of November, 1874,

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to restrain the Defendant from issuing the advertisements set forth in the bill; and the Vice-Chancellor, upon being informed that the Defendant resided at *Greenhithe*, a place distant from *London* about one hour by railway, gave leave to serve notice of motion for the following day, and on the 25th, as no counsel was instructed on behalf of the Defendant, the injunction was granted as to the advertisements in the form of the prayer.

The case now came on upon motion to dissolve the injunction.

Mr. *Higgins*, Q.C., and Mr. *D. Jones*, in support of the motion:—

We submit that upon the construction of the agreement of September, 1866, between the Plaintiffs and the Defendant, the Plaintiffs were not justified in bringing out a work which has never had the sanction or supervision of Mr. *Beeton*. It is true they purchased the right to use the name for all their publications, but the trustees under the arrangement made by Mr. *Beeton* had no right to sell his name for all future time; and Mr. *Beeton* only engaged to give the use of his name for those publications to be brought out under his supervision, and so long as he remained connected with the firm of *Ward, Lock, & Tyler*. The Plaintiffs could not use the name of Mr. *Beeton* for works not superintended by him without committing a fraud upon the public. A publisher has no right to state what is false upon his title-page, and by such means to lead the public to purchase. It was laid down as a principle in the case of *Leather Cloth Company* v. *American Leather Cloth Company* (1), that where an advertisement of a trade or a trade-mark states that which is not true, it cannot be made the subject of protection by the Court of Chancery. So in *Wright* v. *Tallis* (2), where a book was published as a translation of a work written by a well-known German author, and it was discovered that no such German work existed, and the book was in fact the production of an Englishman, it was held that the publisher's conduct was in the nature of *crimen falsi*, and no copyright in such a work could be maintained. In *Maxwell* v. *Hogg* (3) it was stated by Lord Justice *Cairns* that there could be no copyright in a name, under the Act 5 & 6 Vict. c. 45; and in

(1) 11 H. L. C. 523. (2) 1 C. B. 893.
(3) Law Rep. 2 Ch. 307.

this case it is shewn that there is not merely a trade name, but a name by which the public have a guarantee that the work will be done or superintended by Mr. *Beeton*. "*Beeton's Christmas Annual*" is not a trade name which carries with it any value, but it is a Christmas annual conducted by *Beeton*, a man favourably known to the public, which is of importance to the purchasers of the book, and if the book is not conducted by *Beeton* it is no longer "*Beeton's Christmas Annual.*"

Then as regards the conduct of Mr. *Beeton*. It is shewn by the letters which passed between him and the Plaintiffs that the Plaintiffs refused to bring out the annual which he had projected, and for which he had made arrangements with the authors; he was therefore justified in assisting those authors to publish what they had already written under the belief, which they were justified in entertaining, that Mr. *Beeton* would continue to bring out his annual. Mr. *Beeton* gave these gentlemen his assistance in bringing out their own work, which he was perfectly justified in doing, and though the Plaintiffs accuse him of being pecuniarily interested in that work, the fact is absolutely denied by the Defendant, and there is no evidence whatever to shake the statement made by him.

When Mr. *Beeton* found out by the Plaintiffs' advertisement that they were about to bring out his annual without his co-operation, he considered it his duty, both to himself and the public, that it should be known that he had no hand or concern in the Plaintiffs' annual. He consequently issued the advertisement now complained of, in which there is nothing stated but the plain truth in connection with the matter. He states that he had long ago devised his usual annual in collaboration with the authors of "*The Coming K——*" and "*The Siliad*," and that those authors were about to publish an annual under the title of "*Jon Duan*," which would be published by *Weldon*. All this is perfectly true; and Mr. *Beeton's* conduct is quite justifiable after the manner in which he was treated by the Plaintiffs.

Then we say further, that the Plaintiffs have broken their contract with us in bringing out their Christmas annual under Mr. *Beeton's* name without his sanction, and in advertising that book to the public. The case is thus brought under the authority of

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Springhead Spinning Company v. *Riley* (1) and *Maxwell* v. *Hogg* (2), in which Lord *Cairns* said it appeared to him that *Clark* v. *Freeman* (3) might have been decided otherwise than it was, on the ground that a man had a property in his own name. Mr. *Beeton* has a property in his name and in his reputation, and the Plaintiffs are not justified in using his name to a work which he has not sanctioned.

Then we say that the Plaintiffs were not justified in applying for an injunction which was for all practical purposes *ex parte*, when from the correspondence which passed between the parties it is shewn that there was a *bonâ fide* dispute between them, and Mr. *Beeton* would have been willing to come to an amicable settlement.

Mr. *Glasse*, Q.C., and Mr. *Millar*, for the Plaintiffs:—

We are here only for the purpose of supporting the injunction restraining the Defendant, Mr. *Beeton*, from issuing the advertisements. We do not seek to restrain the publication of the work called "*Jon Duan*," and consequently it is not our business to argue whether the Defendant has a right or not to assist in that publication. That we have a perfect title to the use of the Defendant's name as applied to our annual cannot be doubted. In 1866 we purchased from *Beeton's* trustees the whole of his copyright, which of course included his copyright in "*Beeton's Christmas Annual*." This necessarily included the right to the use of *Beeton's* name, for that was the title by which the annual had been known for many years. Then by the agreement of February, 1869, between the Plaintiffs and *Beeton*, the Defendant distinctly contracted to allow the Plaintiffs to use his name for the purpose of their present and future publications, and in consideration of that advantage the Plaintiffs contracted to give *Beeton* a large salary, and even to continue an annuity to him in case they should find it necessary to terminate the agreement. By that agreement Mr. *Beeton* was also bound to give his whole attention to the publishing business of the Plaintiffs. The Plaintiffs instructed him to prepare as usual the Christmas annual for the present year, and these instructions

(1) Law Rep. 6 Eq. 551. (2) Law Rep. 2 Ch. 307, 310.
(3) 11 Beav. 112.

he failed in fulfilling. The Plaintiffs were much dissatisfied with the two previous annuals, and they desired that the contents of this year's annual might be different. They were perfectly justified in this course of conduct. The publishing business is conducted by the Plaintiffs, and it is for them to decide upon the contents of any work they may bring out. The Defendant having sold his copyright, and contracted to allow the use of his name, has no right to interfere or to control the Plaintiffs in the exercise of their judgment. In direct contravention of the agreement entered into by the Defendant, he has issued advertisements, the clear effect of which must necessarily be to damage the Plaintiffs' property. It is asserted by the Defendant himself that he has no pecuniary interest in the publication of the "*Jon Duan*," but if so, why should he warn the public in his advertisement that "his annual," as he calls it—the annual in continuation of "*The Coming K——*" and "*The Siliad*"—will be published, not as formerly, by *Ward, Lock, & Tyler*, but by *Weldon & Co.*? This is setting up a rival publication to destroy the property of his employers. What can be the meaning of such conduct, except a pecuniary interest in the rival annual?

We rest our title to this injunction upon the principle that the Court will restrain the publication of any document tending to the destruction of property, as was done in the case of *Dixon* v. *Holden* (1) and *Rollins* v. *Hinks* (2). Your Honour laid down in the first of these cases, and repeated in the second case, the rule "that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property—whether it consists of money or reputation." Upon these authorities we have a right to maintain our injunction.

Mr. *Higgins*, in reply.

Sir R. Malins, V.C.:—

This is a motion to dissolve an injunction which I granted, not *ex parte*, but upon short notice, on the 25th of November last.

(1) Law Rep. 7 Eq. 488. (2) Law Rep. 13 Eq. 355.

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The case is a painful one in many respects, and I am very sorry that gentlemen have allowed the dispute to go on so far. But now it has been so, I must decide it according to the rights of the parties.

Mr. *Beeton* has long been known as a literary man, particularly connected with periodical publications. This year will be the fifteenth publication of the periodical called "*Beeton's Christmas Annual,*" which was established by him, and from evidence it appears to be a work which has acquired a considerable sale and is of much value. After this publication had been issued to the public for about seven years, Mr. *Beeton* got into difficulties, and in the year 1866 he entered into an arrangement with his creditors, under which the Plaintiffs and *Charles Tyler*, then constituting the firm of *Ward, Lock, & Tyler*, purchased the whole of his copyrights, stock-in-trade, and business property. Now what did they purchase? They purchased, amongst other things, the right to "*Beeton's Christmas Annual.*" What is the meaning of purchasing "*Beeton's Christmas Annual?*" Did it mean that they could not call it "*Beeton's Annual*" unless *Beeton* superintended the publication of it or approved of the contents? It would have been just the same as if they had bought *Blackwood's Magazine*, or *Fraser's Magazine*, or any publication known by a particular name. It does not certainly mean that the person whose name it has borne is to continue to be connected with it, and I take it to be perfectly clear that when they bought all the copyright, they bought all the property, copyright, and so forth, constituting the property of *Beeton;* and it is perfectly clear in my mind that they acquired the right to publish this publication as "*Beeton's Annual,*" although *Beeton* might not have continued to have any connection with it whatever. He was a party to that sale, either he, or his creditors, or his assignee, and nothing can be more unfounded than the contention that selling a periodical publication means only the one number of it. It means the continuance of that thing known as an annual, or a monthly or daily publication, as the case may be. When you sell a newspaper, it is not merely the right to sell one number of it, but continuing to publish it from day to day, it may be as long as the world lasts, under the name by which it has become known; therefore I am of opinion

that the sale of this copyright in 1866 gave the Plaintiffs the right to publish it, although Mr. *Beeton* ceased to have any connection with it.

But, however, he did not cease to have any connection with it, because by an agreement in February, 1869, by which the rights of these parties entirely, in my opinion, depend, the Plaintiffs are to have the use of *Beeton's* name for the purpose of their present and future publications. Therefore, according to this, the Plaintiffs are to have the use of his name for the present and future publications of this annual, "*Beeton's Christmas Annual*," because it was one of their then present publications; and therefore, even if they had not acquired as against *Beeton* by the former contract a right to use that name, this most distinctly gives them that right. What were their publications? Clearly this annual was one of them. But this is not a contract without valuable consideration. What did Mr. *Beeton* get in return? First of all, in consideration of the services of *S. O. Beeton*, and the use of his name, the Plaintiffs were to pay him a salary, commencing for the first year at £400, and increasing every two years till it amounted to one-fourth of the entire profits of the business. He was not to be a partner, nor to be liable for the debts of the firm; but he was to be bound by the statement of accounts which they should render.

This being in 1869, matters went on satisfactorily between them, as far as I know, down to the time of this dispute arising, in the month of October or November last.

The annual was published down to 1873, and it is said that in 1873 the sale was very large. Messrs. *Ward & Lock* seem, from some reasons or other which have not been explained, to have become dissatisfied with the contents of the last publication; but Mr. *Higgins* says, although they became dissatisfied with the contents they continued to sell it, and sold it at a large additional price. All that may be true, but I do not think it affects the question between the parties at present. But with a view to the publication of the annual for the present Christmas, it seems that in July last Mr. *Lock* wrote to Mr. *Beeton* saying, We wish you to put in hand "*Beeton's Annual*" for this year, but want the character of it altered entirely from "*The Siliad*" of last year. That

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does not seem to have been satisfactory to Mr. *Beeton*. He seems to have thought that the character of the work last year was perfectly right—he seems to have taken his own views, and those views did not coincide with the views of his employers, because I must treat him as being the servant or agent of this firm at a salary which, although not fixed in amount, is to be a certain proportion of the profits made by this firm, and they seem to have been rather large in amount, for I find that on the 31st of August last he is told that £969 have been placed to his credit, as being his share of the profits up to the 31st of July preceding. Therefore for his services he received a very considerable remuneration, and those services included his giving his best attention to the conduct of their business, whether as regards that publication or not. However a course of conduct was then adopted by the Plaintiffs which at one time struck me as being of considerable importance, namely, that statement made by Mr. *Beeton*, not contradicted by the Plaintiffs, in which he said that "Shortly afterwards, and on or about the 10th of November, 1874, I discovered that the Plaintiffs had made preparations, without consulting me, and behind my back, for the production of a volume to be designated as '*Beeton's Christmas Annual*' for 1874. I had been in communication with the Plaintiffs, both personally and by letter, while such preparations had been going on, but nothing was said to me on the subject. I was extremely indignant at this, as I considered that the Plaintiffs had no right whatever to use my name to a publication in the production of which I had taken no part." That, I think, is the misapprehension of Mr. *Beeton* which has led to the whole of this unfortunate litigation. He had absolutely sold to the Plaintiffs the right to use the name of "*Beeton's Annual*," and if he was so very anxious that nothing should be published under his name which had not received his sanction, the contract should have gone much beyond what it did; and he should have said that with regard to "*Beeton's Annual*" he should be the editor of it, and should have the control of it, and nothing should be inserted in it of which he did not approve. If he had had that right, if there had been that stipulation, he would have been entitled to come to this Court and say, "This contract they have entered

into with me, but nevertheless, in defiance of it, they are going to publish a work under my name which I have not sanctioned, the contents of which I entirely disapprove, and it is in violation of the contract into which they have entered." But there is nothing of the kind; nothing approaching to it in any way is to be found in the contract. He had given them the absolute right to sell the publication under the name of "*Beeton's Annual*," and he has not stipulated that he shall have any control whatever over that publication. What, then, is he bound to do? He is bound to give, as I read this contract, his best attention to the conduct of the Plaintiffs' business. They are the masters, and he is the servant. He is the servant of Messrs. *Ward & Lock* in this sense, that he was receiving a salary from them, he was bound to conduct their business as they thought fit, and had no right whatever, in my opinion, to dictate in what form they should publish, what works they should publish, or who should publish either that publication or any other they thought fit to bring out.

Now, in this state of things, in the month of October last this dispute became ripe, and Mr. *Beeton*, feeling this dissatisfaction, as he has stated in his affidavit, while he is in the employment of the Plaintiffs, while he is in receipt of their salary, while he is their agent and their servant, without any further communication with them, but this sort of altercation going on, thought fit to issue these advertisements which led to the application for an injunction.

I take it nothing can be more clear, and nothing can be more important to be clearly understood, than that a servant is not to act in defiance of his master—he is not to do anything which is to destroy the property of his master. If he receives his pay he must do his best to earn the pay, but he is not to dictate to those who employ him how they shall conduct their business, nor can he be permitted to issue advertisements of other publications which are calculated to destroy that very business which it is his duty as a servant and agent to preserve. What does he do? It may be that if Mr. *Beeton*, taking this extreme view of his own rights, thought that he was aggrieved by their publishing this annual under his name containing matters which he did not approve of—which, in fact, he disapproved of—it is very possible he might

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have been justified in simply giving an intimation to the public that, although this annual is to be under his name as "*Beeton's Annual*," they are to understand that he has nothing to do with the approval of its contents, and that he is not responsible for them. But he is not satisfied with that. It is quite clear that, being the agent and servant of these Plaintiffs, and bound, as I said before, to do the best he could in their interest, he not only does not do that, but actually fosters the publication of another work, which is in direct opposition to the Plaintiffs, and which, if it succeeds, is calculated entirely to destroy their property. He issues three advertisements; one is a notice to booksellers, another to advertisers, and the third to the public. They are all in nearly the same terms. He begins, "It has just come to my knowledge." That statement is not candid. It is not true, because the date is the 13th of November, and it had not then just come to his knowledge, for he had known of it for a long time. "It has just come to my knowledge that Messrs. *Ward, Lock, & Tyler* are about to announce the issue of '*Beeton's Christmas Annual*' for this year. My long connection with the trade obliges me instantly to state that I have no hand or concern whatever in this annual." It is possible, if it had stopped there, it would not have been a case for an injunction; but he goes on, "Further, I feel it my duty to state that I devised long ago my usual annual for the season." It was not his annual, it ceased to be his annual in 1866, and again by his own contract in 1869 it ceased to be his annual. It was therefore a misrepresentation to say it was "my annual;" he ought to have said "the annual published under my name." He never seems to have got rid of the idea that because his name was associated with it, therefore it was his property; a most erroneous view, as erroneous as he could have taken. Then he goes on, "in collaboration with the authors of '*The Coming K——*' and '*The Siliad*'"—those were the annuals of 1872 and 1873. "The title of the annual now in the press is '*Jon Duan*.' It is written by the authors of '*The Coming K——*' and '*The Siliad*,' and for reasons not pertinent here to state it will not be issued by *Ward, Lock & Tyler*, but by *Weldon & Co.*" Can anything be more plain than that that was intended to tell the public, "Do not buy *Ward, Lock, & Tyler's* annual, that is not my publication, that is the spurious thing.

Although I do not call mine '*Beeton's Annual*,' the real '*Beeton's Annual*' is that which, for reasons not pertinent to state, is not to be issued by *Ward, Lock, & Tyler*, but by *Weldon & Co.*; that is the publication you should buy if you want my annual"? Then comes notice to advertisers, and the notice to the public almost in the same words.

Now, if ever there was an advertisement issued by a servant calculated to destroy the property of his master or employer, this is that publication. He says, The thing they are going to publish is not my work, it is a spurious thing; my work, and mine only, will be published by Messrs. *Weldon & Co.* That is a direct infringement of his duty—the greatest breach of duty, as the employed servant of the Plaintiffs. To go on in this way, recommending a rival publication, was, in my opinion, an act of the greatest impropriety.

Mr. *Beeton* says that he has no pecuniary interest in this rival publication. As he says so, of course I am bound to believe him. But what could have induced him to act thus, instead of endeavouring to further the interests of the booksellers with whom he had this very onerous contract? If he thought he had a case, he ought to have filed a bill to restrain them from publishing that work with his name when he had nothing to do with it; but he took the law into his own hands, and issued the advertisements, which are calculated most materially to injure the Plaintiffs, and, according to his statement, it could do him no good except to gratify his vanity. And when a gentleman thinks fit to destroy the property of his employer for the mere gratification of his vanity, I can find no excuse for him whatever.

If, therefore, this were now before me on a motion for an injunction, I should have no hesitation, upon these materials, in granting the injunction. Then was I wrong—were the parties wrong in applying for the injunction when they did? The case was first mentioned to me on the 24th of November, when, finding that the Defendant resided within an hour's distance by railway from *London*, I gave leave for short notice of motion to be served for the following morning. Mr. *Beeton* has had much experience in Chancery suits, and therefore must have well known the meaning of that notice, and the steps which he should have taken in regard

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to it. He might have written at once to his solicitor to instruct counsel, but as no one appeared for him during the day, I granted the injunction after the facts had been fully stated. I was then of opinion, upon the agreement, that Mr. *Beeton* had no right to set up a rival publication, or to do anything to destroy the property of his employers, Messrs. *Ward & Lock*. If Mr. *Beeton* had felt so much aggrieved by this injunction, he might have instructed counsel to move to dissolve it on the 3rd of December, the first day of the sittings after term, but he has done nothing until to-day, the 21st of December, and I can only suppose that he felt reluctant to come forward to discharge the order.

I am clearly of opinion that the Plaintiffs had a perfect right to continue the publication under the name of "*Beeton's Annual*," and to insert in it such matters as they thought were best calculated to promote their interests. Mr. *Beeton* has taken an entirely erroneous view in thinking that he has any veto as to what the contents of the publication shall be. This motion, therefore, entirely fails, and must be refused with costs.

Solicitors for the Plaintiffs: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Defendant: Messrs. *Allen & Edwards.*

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[1874 H. 247.]

Construction of Will—Securities for Money—Bankers' Deposit Notes.

5 Ch D. 259
6 P D. 203.

A testatrix, having money placed with her bankers on deposit notes, being receipts for the money "to account for on demand," gave "all bonds, promissory notes, and other securities for money in my hands at the time of my decease, and all moneys due thereon," upon certain trusts:—

Held, that the bankers' deposit notes were not included in this bequest, but passed under a residuary clause.

ELIZABETH BADCOCK, by her will, dated the 18th of October, 1871, gave and bequeathed all the stock of the Governor and Company of the *Bank of England*, and all the residue and remainder of all shares and sums of money in bank annuities or

any of the public stocks or funds of *Great Britain* of or to which she should die possessed or entitled, and all dividends and interest which might be due thereon respectively, and not received by her at the time of her decease, "and all bonds, promissory notes, and other securities for money in my hands at the time of my decease, and all money due thereon," unto *Frederick Abbott* and *B. Parsons*, their executors, administrators, and assigns, upon trust to sell and convert and to pay the proceeds to various persons therein mentioned. And as to all her real estate whatsoever and wheresoever, and as to her household furniture, plate, linen, china, books, pictures, and effects, and all the rest and residue of her personal estate and effects of what nature or kind soever, and all such personal estate and effects as by virtue of any power she was enabled to dispose of by her will, she gave and bequeathed the same unto and to the use of *Mary Ellen Badcock*, her heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, to and for her and their own use and benefit.

The testatrix died in December, 1873, and at her death the sum of £600 was standing to her credit at her bankers, but that sum was not standing to her credit on an ordinary drawing account, but was money which had been placed by the testatrix to a deposit account in her name at the *Bucks and Oxon Union Bank* at *Thame* on five different occasions, and bore such interest as was from time to time allowed by the said bank on deposit accounts. The testatrix had on each of the occasions when she had placed money at the bank on deposit taken from the bank a note signed by the manager of the bank as a security, and such notes were all similar in their form, and only differed in their dates and amounts, and the following was a copy of one of such notes:—

"Received of Mrs. *Elizabeth Badcock* one hundred and fifty pounds, to account for on demand. Signed *J. Barratt*."

At the death of the testatrix a sum of £10 7*s.* 6*d.* was due to her for interest on the said sum of £600, and these two sums the trustees and executors paid over to *Mary Ellen Badcock* under the belief that the same passed under the residuary clause in the

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will and was not included in the trust clause under the words "all bonds, promissory notes, and other securities for money."

The bill was filed by *Charles F. Hopkins* and his wife *Mary Hopkins*, who were entitled to one-fifth of the property left by the trust clause, against the trustees and against *Mary E. Badcock*, praying that the trustees might be ordered to pay to the Plaintiffs the said fifth part to which they alleged they were entitled.

Two demurrers were put in to this bill for the purpose of raising the question at issue, one by *Mary Ellen Badcock*, and the other by the trustees of the will.

Mr. *Bristowe*, Q.C., and Mr. *Kaye*, for the demurrer by *M. E. Badcock*:—

The only question raised by this demurrer is whether the £600 deposited by the testatrix at her bankers, for which the bankers gave her deposit notes, passed under the words "all bonds, promissory notes, and other securities for money." The deposit notes are such as all bankers give their customers when they receive money which is not to be placed to the ordinary drawing account, but is to be kept separate, and to receive interest at any specified rate according to the value of money at the period when the transaction takes place. The form of the deposit note was simply this: "Received of Mrs. *Badcock* one hundred and fifty pounds, to account for on demand." These words do not constitute a promissory note, and therefore cannot be a security for money within the meaning of the trust clause.

It is laid down in *Byles* on Bills (1): "If there be no words amounting to a promise to pay, the instrument is merely evidence of a debt, and may be received as such between the parties—such is the common memorandum, I. O. U." The deposit note is therefore a simple I. O. U., but is not a promissory note. The authority for this, given by Mr. Justice *Byles*, is the case of *Horne* v. *Redfearn* (2). There the words of the document were: "I have received the sum of £20 which I borrowed of you, and I have to be accountable for the same with interest;" and it was held to be an agreement and not a promissory note. There was a similar

(1) 11th Ed. pp. 11, 12.

(2) 4 Bing. N. C. 433.

decision in *Sibree* v. *Tripp* (1), where the Plaintiff deposited with the Defendant the sum of £500, and the Defendant signed the following memorandum :—"Mr. *Sibree* has this day deposited with me £500 on the sale of £10,300 £3 per cent. Spanish, to be returned on demand." That was held not to be a promissory note. And in *Barry* v. *Harding* (2) it was decided that an I. O. U. given to the testator for goods sold by him was not a security for money. There could not be an action brought on an I. O. U., nor could there be an action upon such a document as this deposit note. It is only an acknowledgment of debt, which does not amount to a promissory note.

But these words have already been distinctly adjudicated upon. In *Vaisey* v. *Reynolds* (3) a testator gave to one person "all his moneys in hand," and to another "all his moneys out on securities." There the balance at his bankers was held to pass as money in hand. And the case of *Manning* v. *Purcell* (4) is still more conclusive, for there, under a bequest of "all my moneys," it was held to include a balance standing to the credit of the testator at his bankers on an ordinary current account, and also another sum secured by deposit notes at his bankers bearing interest. In *Ogle* v. *Knipe* (5) it was even held that bank stock, being only a share in the capital stock of a banking company, did not pass as a security for money; and it was decided by your Honour in 1868, in *Stein* v. *Ritherdon*, that a bequest of "ready money" included not only money of the testator at his bankers on a drawing account, but also money on deposit at his bankers.

Mr. *Simmonds* appeared for the demurrer by the trustees.

Mr. *J. Pearson*, Q.C., and Mr. *Rawlinson*, in support of the bill :—

The testatrix held these deposit notes of the bankers at the time of making her will, and she must have considered that they were securities for money, as in fact they were, whether under technical language they were promissory notes or not. She must, therefore, have intended to bequeath them under the term "securities

(1) 15 M. & W. 23.
(2) 1 J. & Lat. 475.
(3) 5 Russ. 12.
(4) 2 Sm. & Giff. 284; 7 D. M. & G. 55.
(5) Law Rep. 8 Eq. 434.

(6) See 14 W. R. (1868) 55

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for money." If they were not promissory notes, still the money due from the banker, and acknowledged to have been received by him to be accounted for, might have been recovered either in one Court or another, and she called them what she supposed them to be—securities for money. Therefore, to give effect to the meaning of the testatrix, it must be held that the deposit notes passed under the trust clause in the will.

The passage read from Mr. Justice *Byles'* book is by no means so clear as to shew that these deposit notes are not promissory notes, for he says, "No precise words of contract are essential in a promissory note, provided they amount in legal effect to an unconditional promise to pay; thus, 'I promise to account with *A. B.* or order for £50, value received by me,' has been held a good note within the statute." Where, then, is the difference between "I promise to account for £50," and "Received £50 to account for?" The case cited in support of that passage is *Morris* v. *Lee* (1). Many of the cases cited had reference only to whether the documents required a promissory note stamp or an agreement stamp. That was so in *Horne* v. *Redfearn* (2) and *Sibree* v. *Tripp* (3), but still they were securities, and the money might have been recovered upon them. In other cases, such as *Barry* v. *Harding* (4), the question turned chiefly upon the construction of the will. In that case it was held that the I. O. U. was not a security for money within the meaning of the particular words used in the codicil. This was also the case in *Manning* v. *Purcell* (5).

But there are cases in opposition to those cited. In *Woodhams* v. *Anglo-Australian Assurance Company* (6) a director of a company indebted for calls delivered a deposit note of the company to the Plaintiff for value and without notice, and it was held that the company were liable on the note, and could not set off against the Plaintiff the amount due from the directors for calls; and in *In re General Estates Company* (7), where the directors of a company gave to *H.* an instrument by which the company undertook to pay to the order of *H.* £1000, with interest half-yearly, on presentation

(1) 1 Str. 629.
(2) 4 Bing. N. C. 433.
(3) 15 M. & W. 23.
(4) 1 J. & Lat. 475.
(5) 2 Sm. & Giff. 284; 7 D. M. & G. 55.
(6) 3 Giff. 238.
(7) Law Rep. 3 Ch. 758.

of the annexed warrants, it was held that this was a promissory note, but even if it were not so, still the company were bound to pay upon it. If, therefore, these documents were not promissory notes, they were securities for money, since the money secured upon them might be recovered; so we say, with respect to the deposit notes of this testatrix, if they were not promissory notes they were securities upon which the £600 could have been recovered, and under any circumstances they were intended by the testatrix to pass under the words "securities for money."

SIR R. MALINS, V.C.:—

If I were to construe this will according to what I believe to have been the intention of the testatrix, I should say that she meant to include the deposit notes under the words, "all bonds, promissory notes, and other securities for money in my hands at the time of my decease, and all money due thereon"; but I am bound to give effect to the words of the will in accordance with the authorities. The particular gift will, of course, only pass what is actually included in it, and those portions of the testatrix's property not comprised in the words of that clause will pass under the residuary bequest. It is said that these deposit notes given by the bankers are securities for money, and I should have been of that opinion but for the cases which have already been decided. I should have thought the testatrix would have regarded deposit notes as securities for money, and if the case were *res integra* I should so decide, but I find that the subject has been already adjudicated upon. There are cases in which it has been decided that where a person has money in a bank, and gives all the money at his bankers, that includes also any money he may have on a deposit account. That was the decision in *Vaisey* v. *Reynolds* (1), where a testator gave to one person "all my money in hand," and to another "all my money out on securities," and there the balance at his bankers was held to pass as money in hand. Then in *Manning* v. *Purcell* (2) there was a bequest of "all my moneys," and the testator was possessed of £2000, the balance on his current account at his bankers, and was also entitled to

(1) 5 Russ. 12. (2) 2 Sm. & Giff. 284; 7 D. M. & G. 55.

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£2500 on deposit notes of his bankers bearing interest payable on presentation; both these sums were held to pass under the words "all my moneys." Now what is a security for money? One would say that an I. O. U. would be a security for money, and I should have been inclined to think that it was so; but I find it has been held that under the words "securities for money" an I. O. U. will not pass. If that is so, I cannot see how a deposit note from a banker can be considered as a security for money. The case of *Stein* v. *Ritherdon*, decided by me in 1868, has been cited. I there had to decide the effect of the words "ready money." I held that it was intended to pass the money of the testator at his bankers on a drawing account, and on deposit at call at the time of his death, but not interest on mortgages or dividends on stock. Now what are the deposits in this case? I must take it as the bill states, that the testatrix had from time to time deposited money at her bankers to the amount of £600, and that she had taken a note in the shape of an acknowledgment of the receipt of the money which was to be accounted for. Now, as between the banker and his customer, the contract must be taken to depend upon the written document by which the banker acknowledges the receipt of a sum of money to be accounted for on demand; and if the customer, under such circumstances, were to overdraw his current account, and the banker were to dishonour a draft while he had money of his customer in his hands upon a deposit account, upon such a receipt as was given in this case, the banker would be liable to an action for damages.

I must regard this money, then, as if it were money in the hands of the bankers on an ordinary drawing account, and must hold that it does not pass under the bequest of securities for money. The executors, therefore, have done right in paying it to the persons entitled under the residuary bequest, and the demurrers must be allowed.

Solicitor for the Plaintiffs: Mr. *Crosse*.

Solicitors for the Defendants: Messrs. *Markby, Tarry, & Stewart*; Mr. *Somerville*.

1 L. C. H. N. (1868) 65.

BATLEY *v.* KYNOCK. (No. 2.)

V.-C. B.
1874
Nov. 25.

[1873 B. 178.]

Practice—Patent—Trial of Issues—Particulars of Breaches.

Although upon the trial of questions in a patent suit the Plaintiff's particulars of breaches should give the Defendant full, fair, and distinct notice of the case intended to be made against him, it is not necessary, in the case of an alleged infringement of a patent for improvements of a particular article (*e.g.*, cartridges), for the particulars to point out the precise portions of the specification alleged to have been infringed when the thing alleged to be an infringement has been made an exhibit.

IN this suit, which was instituted for the purpose of restraining an alleged infringement of a patent (vested in the Plaintiffs by assignment) for improvements in cartridges adapted to breech-loading fire-arms, the following issues had been settled for trial before the Vice-Chancellor without a jury:—

1. Whether Messrs. *Jones* (to whom the patent was granted in 1865) were the first and true inventors of the undisclaimed portions of the patent.

2. Novelty of invention.

3. Infringement.

On the 12th of November, 1874, an application by the Plaintiff for leave to inspect the Defendants' manufactory, and all cartridges and machinery therein, was refused (1).

The Plaintiff had delivered the following particulars of breaches:—

That the Defendants, between the 9th of September, 1871 (the date of amending the specification by disclaimer), and the 30th of May, 1873 (the date of filing the bill), made or sold, or caused to be made or sold, cartridges made in the manner described in the specification of the patent granted to *J. & F. J. Jones*, dated the 4th of October, 1865, as amended by the disclaimer and memorandum of alteration dated the 9th of September, 1871, in Plaintiff's amended bill of complaint filed in this cause respectively mentioned: that is to say, in particular cartridges, made

(1) *Ante*, p. 90.

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respectively with a case to which is attached a metal head, and having a cup or chamber formed in the manner described, solid to and in a piece with the head, as and for the purposes mentioned in the said specification.

The Defendants now moved that the Plaintiff should furnish further particulars of the breaches alleged.

Mr. *Swanston*, Q.C., and Mr. *Macrory* (Mr. *E. C. Willis* with them), for the Defendants, in support of the motion:—

The Plaintiff's particulars of breaches are too wide, inasmuch as they simply charge us with infringement, without specifying time, place, or circumstances, or the portions of the invention alleged to have been infringed; and give us no notice of the case against us on which the Plaintiff intends to rely. Under the general jurisdiction of the Court, a Plaintiff has been ordered to specify and point out the particular articles, shewn in the drawings annexed to the specification, in respect of which the infringement, on which he intended to rely, had taken place: *Perry* v. *Mitchell* (1); and by 15 & 16 Vict. c. 83, ss. 41, 43, it is provided that in actions for infringement of patents, particulars of the breaches complained of, and of objections on which the Defendant intends to rely, shall be delivered; that at the trial no evidence shall be allowed in support of any alleged infringement, or of any objection impeaching the validity of the patent, which shall not be contained in the particulars so delivered; and that in taxing the costs, regard shall be had to the particulars delivered in the action. A mere allegation of general user is too wide: *Morgan* v. *Fuller* (2). We ask for a similar order to that made in *Lamb* v. *Nottingham Manufacturing Company* (before the Master of the Rolls on the 14th March, 1874), in which the Plaintiffs were ordered to specify, "by reference to the pages and the lines, the parts of the Plaintiffs' specification in respect of which such alleged breaches have been committed."

Mr. *Kay*, Q.C., and Mr. *Aston*, Q.C. (Mr. *Locock Webb* with them), for the Plaintiff:—

We have been denied inspection of the Defendants' works, and

(1) Webst. P. C. 269. (2) Law Rep. 2 Eq. 297.

there being no admission by the Defendants of infringement, or inspection allowed to the Plaintiff, as in *Lamb* v. *Nottingham Manufacturing Company*, which was an uncontested case upon these points, and therefore no authority upon the present motion, we have to prove the case of infringement which we allege against them as best we can. On the other hand, the Defendants, by the pleadings and particulars, and by the particular cartridges which we produce as exhibits, and undertake to prove to be of their manufacture and infringements of our patent, have full notice of the case intended to be made against them. Under these circumstances, the Plaintiff will not be tied down to the precise terms of scientific definition, by being compelled to set out with minute particularity the parts of the specification alleged to have been infringed: *Needham* v. *Oxley* (1); *Talbot* v. *La Roche* (2). Let the Defendants admit that the cartridges which we produce are of their manufacture, and then *cadit quæstio* as to what is charged with being an infringement of our patent.

Mr. *Swanston*, in reply:—

Talbot v. *La Roche* was the case of a patent for a chemical process, and as the slightest deviation from the proportions indicated would have been fatal to the Plaintiff on technical grounds, he was not tied down to giving a statement of the particular parts of the specification alleged to have been infringed. In *Needham* v. *Oxley*, the particular machines constructed by the Defendant, and complained of as infringements of the patent, were all specified in the particulars of breach. We do not want to tie down the Plaintiffs, but we are entitled to full and fair notice of what is alleged against us, without having to be prepared with evidence upon every line of the specification.

SIR JAMES BACON, V.C.:—

All that is required and provided by the *Patent Law Amendment Act*, 1852, which has made no alteration in the practice to be observed in these cases, is that the Defendants shall not be taken by surprise; and it is the duty of the Judge to take care that by the particulars of breaches they shall have full and fair

(1) 1 H. & M. 248. (2) 15 C. B. 310.

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notice of the case that they will have to meet. In this case the issue between the parties is as plain and simple as can well be. The bill charges that the Defendants have made cartridges in the manner and shape and of the material described in the Plaintiff's patent. In support of his case, the Plaintiff, who has been refused access to the Defendants' works, produces cartridges—the very thing in dispute—which he alleges to be an infringement; and he undertakes to prove that these things which he produces are of the manufacture of the Defendants. These articles have been made exhibits in the cause, and the Plaintiff in producing them has, in my judgment, given the Defendants all the information which they can require, for they best know what they have or have not done. The case of *Lamb* v. *Nottingham Manufacturing Company* has been referred to, and urged to be an authority for the order now asked; but that was the case of a complicated machine. In that case there had been inspection and examination, and there the Plaintiff had very properly been required to point out what particular parts of the machine he alleged to be infringements of his patent. There is no analogy between that case and this. Here, the very thing in dispute which is no bigger than one's thumb, and is not a complicated machine, is made an exhibit. What ground, therefore, is there for the objection as to insufficiency of the particulars, when a Plaintiff produces the exhibit, and says, "I hold in my hand the very article by which you infringe?" It would be only hampering the Plaintiff to compel him to specify minutely the particular portions of his specification alleged to have been infringed; and as I am of opinion that the Defendants, by the pleadings and particulars of breaches, have had full, fair, and sufficient notice of the case intended to be raised against them, the motion must be refused with costs.

Solicitors: Messrs. *Stibbard & Cronshey;* Messrs. *Treherne & Wolferstan.*

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V.-C. B.

1874

[1872 H. 290.]

Dec. 15, 16, 19.

1875

Jan. 11.

Voluntary Gift—Intended Transfer of Property—Declaration of Trust.

Testator, who was the owner of a share in a colliery, on the 11th of February, 1865, wrote to the Plaintiff, his daughter, as follows:—"I have another present to make shortly, one share of *Ryhope Colliery* . . . and you may now consider that you have this yourself from 2nd January to receive dividends upon. I am also giving to *Sarah* one, the same." On the 17th he attended a meeting of shareholders in the colliery, and signed the following entry in the minute book:—"That Mr. *N.'s*" (his own) "proposition of transferring two of his shares to the parties undernamed be agreed to, viz." (the Plaintiff and her sister). It was admitted that this signature was not sufficient, according to the regulations of the deed of partnership, to pass the property in the shares. On the 25th of February he again wrote to the Plaintiff:—"I have arranged and made all right with the shares for you and *Sarah*, and dividends will be sent from 2nd January." On the 4th of March, the testator wrote to the Plaintiff:—"Next meeting (private) we will be enabled to make another dividend, when you and *Sarah* will be informed." On the 16th of March he sent the Plaintiff a cheque for the first dividend, with a letter thus:—"Herewith I enclose cheque for £37 10s., which you can receive at the bank . . . first dividend, made this day." On the 18th of March he again wrote to the Plaintiff, as follows:—"I have yours in reply to the receipt of dividend—long may you live to enjoy it;" and in the same letter, after referring to the meeting of the 17th of January, he further said:—"Well, when I got in, I openly at once asked the question in the presence of" (four persons whom he named), "I was about to give to my two daughters one share each, and which is the way to do it? They were all pleased. It was entered in the minutes of the book":—

Held, that the above expressions in letters, signature of minute, and gift of dividend, did not amount to a declaration by the testator, nor to proof of an intention and determination on his part, that he would hold the shares for the Plaintiff; but that the testator, having the desire and intention that she should, from and after the 11th of February, 1865, have the shares as her property, failed to fulfil that desire, and complete that intention.

CAUSE.

At the date of the transactions below mentioned the *Ryhope Colliery*, in the county of *Durham*, was divided, in point of interest into 512 shares, of which four were commonly held together—such four 512ths being usually spoken of and treated as one "share."

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In the beginning of the year 1865 the testator, *William Nicholson*, was the owner of several of these "shares."

By the deed of partnership under which the colliery company was constituted, dated the 1st of January, 1859, it was, amongst other things, provided as follows:—

32. That no partner should sell or transfer by way of sale to any person (not being his son, brother, or nephew) any share held by him in the co-partnership, save under the provision in that behalf thereinafter contained, and that no partner should on any other occasion, without the consent of a special meeting of the co-partners, transfer any such share to any person not being a co-partner.

38. That all transfers of shares in the said co-partnership should be in a form approved of by the solicitor of the co-partnership, otherwise the same should be void, and that all transfers should forthwith after execution, or in cases of such purchase as therein referred to at such time as therein provided in that behalf, be lodged at the principal office of the co-partnership.

39. That no person should thereafter be admitted or become a partner in the said co-partnership until he should have lodged the deed or instrument of transfer (if any) to him at the principal office of the co-partnership, and until he should have executed and lodged as aforesaid some deed approved by the solicitor of the partnership, and prepared by him at such person's expense, by which such person should bind himself to observe, perform, and become subject to the covenants and provisions contained in or made by virtue of the now-stating indenture, and that until the requisitions of that clause were complied with, any deed or instrument of transfer which might have been executed should, as regarded the co-partnership, be of no effect.

On the 11th of February, 1865, the testator wrote to his daughter *Louisa*, the wife of the Rev. *Charles Tebbott Heartley*, in these terms:—

"I have another present to make shortly, one share of *Ryhope Colliery* . . . making all alike, and you may now consider that you have this to yourself from 2nd January to receive dividends upon. I am also giving to *Sarah* one, the same, which will I

trust make you both more independent . . . . the share is worth £2000."

On the 17th of February an ordinary meeting of the partners was held, at which the testator and two of his sons, *William* and *John*, who were also partners, and other partners, were present. At this meeting the testator announced his intention of transferring one of his shares to each of his two daughters, *Louisa Heartley* and *Sarah Elizabeth*, the wife of *William Lewers*. This proposal was agreed to, as appeared by the following entry in the minute book:—

"That Mr. *Nicholson's* propositions of transferring two of his shares to the parties under-named be agreed to, viz.—

"*L. N. Heartley*, 1 per 128.
"*S. E. Lewers*, 1 per 128."

This minute was written in the book by *John Nicholson*, and was signed by the testator.

On the 25th the testator wrote to his daughter *Louisa* as follows:—

"I have arranged and made all right with the shares for you and *Sarah*, and dividends will be sent from 2nd January."

On the 4th of March the testator wrote again to his daughter *Louisa* as follows:—

"Next meeting (private) we will be enabled to make another dividend, when you and *Sarah* will be informed."

On the 16th of March the testator sent to his daughter *Louisa* a cheque drawn in the name of the partnership firm, for the first dividend which became due on one "share," with a letter, in which was the following passage:—

"Herewith I enclose cheque for £37 10*s.*, which you can receive at the bank in *Swansea*, first dividend, made this day."

On the 18th of March the testator again wrote to his daughter *Louisa*, as follows:—

"I have yours in reply to the receipt of dividend, long may you live to enjoy it." . . . . (After referring to the meeting of the 17th

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of January, the writer continued): "Well, when I got in, I openly at once asked the question in the presence of *Haddock*, the book keeper, *J. Reed*, *John Taylor* and *John Nicholson*, 'I was about to give to my two daughters one share each, and which is the way to do it?' They were all pleased. It was entered in the minutes of the book."

On the 10th of July, 1865, the testator made his will, whereby he bequeathed a sum of £3000 in trust for each of his daughters, Mrs. *Heartley* and Mrs. *Lewers;* and also bequeathed two of the shares in the colliery to his trustees, upon certain trusts as to one of such shares for the benefit of Mrs. *Heartley*, her husband and children. He further devised and bequeathed to his sons (*William* and *John Nicholson*) all the residue of his real and personal estate.

The testator died on the 12th of September, 1865.

After his death the dividends upon one "share" only in the colliery were paid to Mrs. *Heartley's* trustees, and her name was entered in the ledger of the company as the owner of such "share."

On the 14th of December, 1872, the bill was filed by Mr. and Mrs. *Heartley* against *William* and *John Nicholson*, claiming in substance one "share" (viz., four 512ths) in the colliery, in addition to the "share" bequeathed by the will. The Defendants, on the other hand, claimed the same "share" as part of the testator's residuary personal estate.

The bill, as amended, prayed for an account of the £3000 legacy, and for payment or security of the same; for a declaration that upon the testator's decease one share (four 512ths) in the colliery became and still was unconditionally subject to the trusts of the will in favour of the Plaintiffs; for an account and payment of the dividends of such last-mentioned share; and further, for a declaration that the female Plaintiff, for her separate use, or at all events the Plaintiffs, or one of them, was or were, and had or had been from the testator's decease entitled, independently of the will, to one other share (four 512ths) of the colliery; and for consequential relief.

The prayer of the bill, so far as it related to the £3000 legacy and the first mentioned "share," was not disputed.

Mr. *Cole*, Q.C., Mr. *Kay*, Q.C., and Mr. *Romer*, for the Plaintiffs:—

The letters and acts of the testator amounted to a valid and complete declaration of trust of this "share" in favour of the Plaintiffs; enough was done by the testator to constitute himself a trustee for them: *Wheatley* v. *Purr* (1); *Thorpe* v. *Owen* (2); *Stapleton* v. *Stapleton* (3); *Gray* v. *Gray* (4); *Vandenberg* v. *Palmer* (5); *Ex parte Pye* (6); *Kekewich* v. *Manning* (7).

No presumption of satisfaction arises in this case: *Lord Chichester* v. *Coventry* (8); *Hall* v. *Hill* (9); *Wilson* v. *O'Leary* (10).

Mr. *Jackson*, Q.C., Mr. *Chitty*, Q.C., and Mr. *Caldecott*, for the Defendants:—

The intention of the testator was to make a gift, but he never fulfilled the intention; his expressions and acts all point to something to be done thereafter.

No doubt where a person possessed of personal estate makes a clear declaration of trust, there, though he retains the property in his possession, he retains it for the benefit of the *cestui que trust.*

Milroy v. *Lord* (11) contains a well known exposition of the law (12) with regard to what is necessary to make a voluntary settlement effectual. The Lord Justices held that what was done in that case did not amount to a perfect gift. They then proceeded to lay down the doctrine that a Court of Equity will not make perfect an imperfect gift; and then came the further question whether by the acts of the settlor he had constituted himself a trustee for the purposes of the settlement. Lord Justice *Turner* declared that the Court would not be justified in so treating him, and said (13): "By doing so we should be converting the settlement or the parol declaration to a purpose wholly different from that which was intended to be effected by it, and, as I have said,

(1) 1 Keen, 551.
(2) 5 Beav. 224.
(3) 14 Sim. 186.
(4) 2 Sim. (N. S.) 273.
(5) 4 K. & J. 204.
(6) 18 Ves. 140.
(7) 1 D. M. & G. 176.
(8) Law Rep. 2 H. L. 71.
(9) 1 D. & War. 94.
(10) Law Rep. 7 Ch. 448.
(11) 4 D. F. & J. 264.
(12) Ibid. 274.
(13) 4 D. F. & J. 275.

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creating a perfect trust out of an imperfect transaction." These remarks apply precisely to this case.

The theory of this bill is the decision in *Richardson* v. *Richardson* (1), but the authority of that case, and of *Morgan* v. *Malleson* (2), is, to say the least, very much shaken by *Warriner* v. *Rogers* (3) and *Richards* v. *Delbridge* (4).

We say, then, there was never any transfer of this share *inter vivos*, nor any attempt at one: if there had been, the Plaintiffs must have been held to be satisfied, or put to their election; and, moreover, there was no valid declaration of trust. The correspondence, taken together with the signature of minute, and the payment of dividend, were not enough: *Hughes* v. *Stubbs* (5); *Smith* v. *Warde* (6).

The doctrine of presumption against double portions applies: *Hinchcliffe* v. *Hinchcliffe* (7); *Lady Thynne* v. *Earl of Glengall* (8).

To establish the constitution by the testator of himself as trustee, his mind and intention just before his death must be looked at and considered. How did he express himself? There is little difficulty in coming to the conclusion that his expressions had reference to future action. How did he act? He gave the dividends to his daughter. There is more difficulty in this; but the true meaning is, that he meant to give the dividends, until he gave the share, which of course would carry the dividends.

Mr. *Kay*, in reply.

1875. Jan. 11. SIR JAMES BACON, V.C.:—

The bill in this suit prays that the Defendants, who are the executors and residuary legatees of the testator *William Nicholson*, may pay and secure a legacy of £3000 bequeathed upon trusts for the benefit of the Plaintiffs as expressed in the will; and also four 512th shares in a company or partnership called the *Ryhope Colliery*, in which the testator was a partner; and the Plaintiffs ask further, for a declaration that the Plaintiffs are entitled to

(1) Law Rep. 3 Eq. 686.
(2) Ibid. 10 Eq. 475.
(3) Ibid. 16 Eq. 340.
(4) Ibid. 18 Eq. 11.
(5) 1 Hare, 476.
(6) 15 Sim. 56.
(7) 3 Ves. 516, 526, 527.
(8) 2 H. L. C. 131.

four other 512th shares in the same colliery in addition to the four shares bequeathed for their benefit by the will.

The claim as to the legacy and the first-mentioned shares is not disputed by the Defendants, but as to the secondly-mentioned shares the Defendants insist that they formed part of the estate of the testator at the time of his decease, and therefore passed to the Defendants by the residuary bequest contained in the will.

The Plaintiffs allege and insist that by the manner in which the testator dealt with these shares in his lifetime he constituted himself a trustee of them for the Plaintiffs. And this contention has been the subject of the arguments which have been addressed to the Court, and it alone calls for judicial decision.

All such questions are, from their very nature, of difficulty, and sometimes of very great nicety. The difficulty is occasioned by the desire which the Court must feel to give full effect to the intention of the party or parties to the transaction, and by the duty which the Court is under of preserving unimpaired those rules which have been established and which form the law, even though they should frustrate the plain intention. The nicety often arises from the attending circumstances, because they require the closest consideration in order to arrive at a satisfactory conclusion as to what was the true intention, and as to the propriety of carrying that intention into effect.

The cases in the books, which are more or less applicable to the present (many of which have been referred to in the discussion before me), exhibit instances of the manner in which the Court has discharged the duty imposed upon it, and establish the rules by which that duty is prescribed.

The facts necessary to be borne in mind appear to be these: The testator, who carried on the business of a shipowner at *Sunderland*, in partnership with his sons, the Defendants, was, as I have said, a member of a joint stock company, owning and working for their common benefit a colliery called the *Ryhope Coal Company*, the shares in which were divided into 512. The Defendants as well as the testator were owners of shares in the same company. The constitution of the company was established by a deed, which, among other things, provided that no partner should transfer any of his shares without the consent of a special meeting of the co-

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partners, that all transfers should be in a prescribed form, and that no person should be admitted as a partner until he should have executed a deed binding himself to perform all the conditions and provisions contained in the original partnership deed.

On the 11th of February, 1865, the testator wrote to the Plaintiff, his daughter, in these terms: "I have another present to make shortly—one share of *Ryhope Colliery* . . . and you may now consider that you have this to yourself from 2nd January to receive dividends upon. I am also giving to *Sarah* one, the same." An ordinary meeting of the partners in the colliery took place on the 17th of the same month of February, at which the testator, his two sons, the Defendants, and other partners in the colliery were present, and at which it appears that the testator announced his intention of transferring one of his shares to each of the two daughters. This intention was recorded in the minute-book of the company in these terms: "That Mr. *Nicholson's* proposition of transferring two of his shares to the parties under-named be agreed to, viz., *L. N. Heartley*, 1 per 128; *G. E. Lewers*, 1 per 128." This minute was written in the book by *John Nicholson*, one of the Defendants, and signed by the testator. There is some conflict of statement as to whether the other Defendant, *William Nicholson*, was present at the time when the testator made the proposition mentioned in the minute; but there is no doubt he was present at the meeting, and that he was acquainted with the entry in the book shortly after it was made. And whether he did or did not assent to or dissent from it, appears to be of no importance. On the 25th of the same month of February the testator wrote to his daughter, the Plaintiff, thus: "I have arranged and made all right with the shares for you and *Sarah*, and dividends will be sent from 2nd January." On the 4th of March, 1865, the testator wrote to the Plaintiff: "Next meeting (private) we will be enabled to make another dividend, when you and *Sarah* will be informed."

On the 16th of March, 1865, the testator sent to the Plaintiff a cheque for the first dividend which became due on the share mentioned in his previous letters in a letter thus: "Herewith I enclose cheque for £37 10*s.*, which you can receive at the bank in *Swansea*—first dividend, made this day."

The Plaintiff would seem to have acknowledged the receipt of

this cheque, for in a letter from the testator to her of the 18th of March he wrote: "I have yours in reply to the receipt of dividend—long may you live to enjoy it." And in the same letter, referring to what had taken place on the 17th of February, he wrote: "Well, when I got in, I openly, at once, asked the question in the presence of *Haddock,* the bookkeeper, *J. Reed, John Taylor,* and *John Nicholson,* 'I was about to give to my two daughters one share each, and which is the way to do it?' They were all pleased. It was entered in the minutes of the book."

On the 10th of July, 1865, the testator made his will, by which he left a sum of £3000 in trust for each of his daughters, the Plaintiff and Mrs. *Lewers,* upon which no question arises, and bequeathed one share in the colliery to his trustees, the Defendants, upon trust for the benefit of his daughter, the Plaintiff, her husband and children. And he devised and bequeathed all his residuary real and personal estate to the Defendants. The testator died on the 12th of September, 1865, and his will was proved by the Defendants in March following.

From the death of the testator the dividends upon one share as it is called in the pleadings, or more accurately 4-512th shares, have been paid by the Defendants to the Plaintiff, and her name as the owner of such share has been entered in the ledger of the company.

The Plaintiffs insisted that under the circumstances I have stated the Plaintiff became absolutely entitled to 4-512th shares by reason of the manner in which the testator had dealt with them in his lifetime; or that, if the shares could be in any sense held to be vested in the Defendants, they were trustees for her of the same shares. The former claim has not been urged at the Bar, and the only question to be considered is, whether the testator had declared or constituted himself a trustee of the same shares for the Plaintiff.

That no perfect transfer was at any time made by the testator appears to be perfectly clear; but it is not less clear to me that the testator intended to give, and on the 11th of February believed he had given, the shares in question to the Plaintiff, his daughter. It is, however, established as unquestionable law that this Court cannot by its authority render that gift perfect which the donor

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has left imperfect, and it will not and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection. In *Milroy* v. *Lord* (1) (as well as in many other cases) the error of dealing with the subject in any other manner, and the dangerous consequences which might thence ensue, are forcibly pointed out, and in that case the notion that the donor meant himself to become a trustee was effectually excluded by the fact of his having appointed another person to be trustee.

But, without incurring the danger alluded to, it is not impossible that an intending donor may by acts or words, in addition to and independent of the imperfect gift, have constituted himself a trustee, and the Defendants have in this case contended, and have proved (although the evidence was adduced for a different purpose), that the donor knew that what he had proposed or intended on the 17th of February was insufficient to accomplish his purpose.

It remains, therefore, only to be considered whether or not the testator did in his lifetime constitute himself such trustee. It is not necessary that the declaration of a trust should be in terms explicit. But what I take the law to require is, that the donor should have evinced by acts which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right to it, if any, as he retained was held by him in trust for the donee. Now, applying this principle to the present case, I do not find anything expressed by the testator which can endure that test. All that he wrote and all that he did relate to a gift or transfer of a nature wholly different from a trust. Nor does the transmission by him to the Plaintiff of the dividends which became due in his lifetime carry the matter further. For not only was a similar transmission of dividends held in *Milroy* v. *Lord* to be insufficient, but the fact in the present case is not of itself clear and unequivocal. For it appears that shares held by the testator and his sons (being twelve in number) were kept in one account in the name of "*W. Nicholson & Sons*," in the books of the company, and the whole amount of the dividends on those shares was paid by one cheque in favour

(1) 4 D. F. & J. 264.

of that firm, and so received, while the amount of the dividends transmitted to the Plaintiff was afterwards paid by a cheque drawn in the name of the firm. Now, assuming that this was done by or by the direction of the testator, it is by no means clear that it must of necessity be referred to his character of trustee, since it is equally applicable to his intention as donor only. Upon a similar cheque which was sent to the Plaintiff after the testator's death and before his will was proved, no further observation seems to be necessary, since she was clearly entitled to that under the bequest in the will.

Then do these circumstances I have narrated amount to a declaration by the testator, or do they amount to proof of an intention and determination on his part that he would hold the shares which he had meant to transfer to the Plaintiff in trust for her? I am compelled to say that they do not; and however clearly I may be convinced (as I do not hesitate to say I am) that it was the desire and intention of the testator that from the 11th of February, 1865, she should have as her own property the shares in question, which had theretofore been his, he failed to fulfil that desire and to complete that intention. I am further compelled to say that I find no fact from which I can safely infer that it was at any time the intention of the testator that he should retain the same shares in his own hands in trust for the Plaintiff.

The authorities upon the subject are numerous. Many of them have been cited on behalf of the Plaintiff, but all of these will be found upon examination to have proceeded either upon such facts as led the Court to the conclusion that the gift intended had been, in fact, completed, or such as left no doubt of the fact that the donor had parted with all beneficial interest in the subject, and had, by words or deed, constituted himself a trustee for the donee.

On the other hand, the law as laid down in *Milroy* v. *Lord* (1), and the other authorities on which the Defendants rely, is clear and distinct. I had occasion to consider all these authorities on a recent occasion in a case of *Warriner* v. *Rogers* (2), and to the conclusion of law at which I then arrived I adhere, and not the less because I have the advantage of a subsequent decision of

(1) 4 D. F. & J. 264. (2) Law Rep. 16 Eq. 340.

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the Master of the Rolls in *Richards* v. *Delbridge*, who states the law thus (1):—"The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise."

This, which I have gone into at length, being the sole question to be decided in the suit—for all the rest is, as I have said, undisputed—I regret to find that the length and cost of the litigation have been most needlessly augmented by an attempt on the part of the Defendants to make out that the shares which the testator gave to the Plaintiff on the 11th of February, 1865, are the same as those which he bequeathed upon trusts for her and her husband and children by his will of the 10th of July in the same year. To this end evidence has been tendered which is wholly inadmissible, and arguments have been adduced for the purpose of establishing a case of election, for which there is no foundation.

All that I can do, therefore, is to decree that the Plaintiffs are entitled to have secured the legacy of £3000, and the shares bequeathed upon the trusts declared of those two subjects by the will. And, as well because of the nature of the defence founded upon the construction of the will, as of the evidence to which I have referred, I think that the costs of the suit should, and I therefore order that they shall, be borne by the estate of the testator.

Solicitor for the Plaintiff: Mr. *W. M. Hacon*, agent for Mr. *Charles Norton, Swansea.*

Solicitors for the Defendants: Messrs. *Shum, Crossman, & Crossman*, agents for Messrs. *Kidson, Son, & McKenzie, Sunderland.*

(1) Law Rep. 18 Eq. 11, 15.

In re BENNETT'S TRUSTS.

V.-C. B.
1874
Dec. 12.

Bankruptcy—Liquidation by Arrangement—Close of the Liquidation—Discharge of the Debtor—Bankruptcy Act, 1869, *ss.* 12, 15, 47, 125, *sub-s.* 7, 9—*Bankruptcy Rules*, 1870, *rr.* 139, 303, 304, 305—*Forms Nos.* 122, 123, 124.

Until a liquidation by arrangement under the *Bankruptcy Act*, 1869, has been closed by a resolution of creditors, property acquired by the debtor, though after he has obtained his discharge, is property divisible amongst the creditors.

The intention of the framers of the *Bankruptcy Act*, 1869, was, to make the close of the liquidation, the discharge of the debtor, and the release of the trustee, three separate and distinct things, to be granted by resolution of the creditors; and the fact that the creditors have granted the debtor his discharge, does not imply that the liquidation is closed.

PETITION.

On the 22nd of August, 1872, the Petitioner, *Charles John Mold*, filed a Petition in the County Court at *Chesterfield*, alleging that he was desirous of instituting proceedings for the liquidation of his affairs by arrangement; and praying that notices convening meetings of his creditors might be sent in the prescribed form.

At a general meeting of creditors held under the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), on the 16th of September, 1872, it was resolved by the statutory majority present that the debtor's affairs should be liquidated by arrangement, and not in bankruptcy; that *Robert Mellors* should be appointed trustee in the matter, and that the discharge of the debtor should be, and the same was thereby granted, on the 1st of December then next.

The above resolution was duly registered in the Court of Bankruptcy on the 18th of September, 1872.

No resolution with respect to the close of the liquidation, or the release of the trustee, was passed at this, or had been passed at any subsequent meeting.

The trustee under the liquidation duly (but at what date was not stated) reported the grant of the debtor's discharge to the Registrar of the County Court.

On the 13th of January, 1873, the testator, *Joseph Bennett Hankin Bennett*, died, having by will given to the Petitioner a a legacy of £1000.

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On the 4th of February, 1873, the Registrar of the County Court signed and gave to the debtor his certificate of discharge.

The trustees of the will paid the £1000 legacy into Court upon an affidavit stating they were advised it was doubtful whether the certificate of discharge had any retrospective operation.

Thereupon the debtor presented this Petition, praying that, after payment of the costs of the Petitioner, and of all proper parties of and incident to the application, the residue of the fund might be paid to him and his incumbrancers.

Mr. *G. W. Lawrance* (Mr. *De Gex*, Q.C., with him) for the Petitioner:—

Rule 139 of the *Bankruptcy Rules*, 1870, provides that "an order of discharge shall be dated of the day on which it is made, and shall take effect on and from the day of its date."

Sub-sect. 10 of sect. 125 of the *Bankruptcy Act*, 1869, provides that "the trustee shall report to the Registrar the discharge of the debtor, and a certificate of such discharge given by the Registrar shall have the same effect as an order of discharge given to a bankrupt under this Act." This might seem at first sight to imply that the discharge of a debtor takes effect only from the date of the certificate; but having regard to the language of sub-sect. 9 of sect. 125, which provides that the discharge may be granted by a resolution of creditors, and to the form of the certificate (No. 124 of the Forms annexed to the Bankruptcy Rules) of the debtor's discharge, which is based on the report of the trustee (Form No. 123), certifying that the discharge of the debtor was, in this instance, granted to him on the 1st of December, 1873—there can be little doubt that this Petitioner's discharge took effect from the 1st of December, 1873.

Mr. *Little*, Q.C., and Mr. *Everitt*, for the trustee under the liquidation:—

Our view is in favour of the Petitioner's contention, as to the commencement of the effect of the discharge.

But what we say is, that the close of the liquidation has not been fixed by a resolution of creditors (sub-sect. 9 of sect. 125); that by sub-sect. 7 all the provisions of the Act are to apply to the case of a liquidation by arrangement in the same manner as if the word

"bankrupt" included a liquidation debtor, with a certain modification; that the 47th section prescribes how a bankruptcy is to be closed, namely, by an order of the Court; and that by the 15th section the property of the bankrupt "divisible amongst his creditors" is to comprise, amongst other things, all such property as (sub-sect. 3) "may be acquired by or devolve on" the bankrupt during the continuance of the bankruptcy.

We say that this is a continuing liquidation, and that this legacy belongs to the trustee under the liquidation as property divisible amongst the creditors.

Mr. *Cookson*, for the trustees of the will.

Mr. *Lawrance*, in reply:—

Under the law prior to the Act of 1869, an order of discharge had the same effect as a discharge under the *Insolvent Debtors Act* before the Act of 1861, namely, that of restoring to the bankrupt or insolvent his capacity to retain for his own benefit property which might accrue to him; and it is submitted that the discharge of a debtor under the present Act must have the same effect. If not, then unless and until the liquidation has been closed, no one will be able to have any dealings with a debtor under liquidation for ten or twenty years—possibly during his whole life. Nothing will belong to him, except perhaps his own personal earnings.

From sub-sect. 7 of sect. 125 of the Act, and Rules 304 and 306, it would seem to be wholly out of the power of the liquidation debtor to summon a meeting for the purpose of getting the close of the liquidation fixed. The only rule empowering a debtor to summon a meeting is the 306th, which is for another purpose. So that the debtor is left wholly at the mercy of the creditors or the trustee.

Process against the debtor is suspended by sect. 12 of the Act; and if the discharge does not protect his after-acquired property, it seems to be totally useless—a mere superfluity.

It may be said that at a first meeting of creditors they have no opportunity of knowing fully of what the property consists; but the answer to that is, that they should not grant the debtor his discharge until they have found out what the extent of his property is.

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SIR JAMES BACON, V.C.:—

I must decline altogether to speculate upon what difficulties may arise in carrying this Act of Parliament into execution, but I find very clearly from the statute that the discharge of the debtor and the close of the liquidation are two totally separate and distinct things.

From the 122nd of the Forms annexed to the *Bankruptcy Rules*, 1870, being the Form of "Resolution for Debtors' Discharge," it appears that the Form of resolution which the creditors are by Rule 303 required to adopt is as follows: They are to resolve "That the discharge of the said *A. B.* be and the same is hereby granted;" and I have no doubt that the discharge of the debtor, properly so called—that is, his discharge from any personal liability, or liability to arrest, if arrest had not been abolished, as it has been, by law—takes effect either from the day on which the resolution is come to, or at least from the time when the certificate is given by the Registrar—it is not necessary for the present purpose to inquire which.

Then the Form goes on to say "That the close of this liquidation shall take place on and from" a day to be fixed.

Now upon that question the creditors have not come to any resolution. Any property, therefore, which may be acquired by the debtor, though after his discharge, is part of the estate which the trustee under the liquidation has to administer.

Where is the section of the Act of Parliament that points to any different construction? By sect. 47, when the whole of the bankrupt's property has been realised, or so much as can be realised without needlessly protracting the bankruptcy, or a composition or arrangement has been completed, the trustee is to report to the Court, and the Court, if satisfied, "shall make an order that the bankruptcy has closed, and the bankruptcy shall be deemed to have closed at and after the date of such order;" and then by sect. 15, "the property of the bankrupt divisible amongst his creditors" is made to comprise "all such property as may be acquired by or devolve on him during its continuance."

In this instance, the liquidation has not been closed, *ergo*, it is a continuing liquidation, and consequently this property having devolved on the debtor during its continuance is divisible amongst

his creditors. Then the 7th sub-section of sect. 125 provides that the trustee under a liquidation is to have the same powers and perform the same duties as a trustee under a bankruptcy, and the property of the debtor is to be distributed in the same manner as in a bankruptcy; and with certain modifications, the provisions of the Act relating to bankruptcy are to apply to a liquidation. Then sub-sect. 9 declares that with respect to three things—namely, the close of the bankruptcy, the discharge of the bankrupt, and the release of the trustee—the provisions of the Act are not to apply. These three things (with a fourth relating to the audit of accounts by the comptroller) are the modifications before referred to; they constitute the difference which there is between a liquidation by arrangement and a bankruptcy. But then the sub-section goes on to say that the close of the bankruptcy may be fixed, and the discharge of the bankrupt, and the release of the trustee, granted by a resolution of the creditors. Everything tends to shew that the intention was to keep these three matters distinct from each other; and because the creditors have in this instance granted the debtor his discharge, it does not follow that they have fixed the close of the liquidation.

In my opinion, the Respondent the trustee is entitled to the property which is the subject of this Petition.

The order will be, that after payment of costs, the rest of the fund be paid to the trustee. I think the Petitioner must have his costs.

Mr. *Cookson* asked for the costs of the trustees of the will who had not deducted their expenses when they paid the money in.

Mr. *Little*, Q.C., objected to the payment of the costs of the trustees' appearance.

The VICE-CHANCELLOR, finding they had been made Respondents and had been served, and no sum tendered to them, allowed them their costs of appearance (1).

Solicitors: Messrs. *Torr, Janeway, & Co.*; Mr. *Braikenridge.*

(1) At the close of the discussion it was stated that a similar decision to the above, with regard to the status of a bankrupt whose bankruptcy has not been closed, was arrived at by the Judge of the *Liverpool* County Court, in a case of *Cohen* v. *Holden*, on the 14th of November, 1874.

V.-C. H.
1874
Dec. 10.

BATSTONE *v.* SALTER.

[1873 B. 150.]

Transfer of Stock into Names of Transferor, Daughter, and Son-in-law—Advancement—Resulting Trust.

Stock was transferred by a lady into the names of herself, her daughter, and the daughter's husband: the dividends on the stock were received by the son-in-law and paid over to the transferor during her life. The daughter predeceased her mother, and the son-in-law survived her:—

Held, that there was no resulting trust, and that the son-in-law was entitled to the stock.

Affirmed 6 Ch. App. 22 L.R. 10 Ch. 431.

On the 15th of September, 1864, *Mary Ann Wakeford* sold out £100 Consols, part of a larger sum of £1000 Consols standing in her name, and applied the proceeds to her own use, and transferred the balance of £900 Consols into the joint names of herself and her son-in-law and daughter, *Henry Salter* and *Margaret Salter*. *Mary Ann Wakeford* was then sixty-nine years of age and very infirm. Subsequently to the transfer, the son-in-law, *Henry Salter*, received the dividends, and accounted for the same, or the greater part thereof, to the said *M. A. Wakeford*. During the last seven years of her life the Defendant, *Henry Salter*, managed the property, and received and paid over to the said *Mary Ann Wakeford* the whole of her income. She made her will, dated the 15th of May, 1868, whereby she gave certain specific legacies to her daughters, and gave the residue of her real and personal estate among her children.

Margaret Salter died without issue on the 4th of July, 1869. *Mary Ann Wakeford* died on the 9th of November, 1871, testate, and her will was proved by the Plaintiff, one of her executors. At her death the sum of £900 Consols was in her own name and that of *Henry Salter*. On the 7th of March, 1873, the executor, by the direction of Vice-Chancellor *Wickens*, filed a bill against *Henry Salter*, praying that it might be declared that he was a trustee for the residuary legatees named in the will.

The Defendant deposed that the intention of the transferor was to benefit him. The Plaintiff gave some evidence to shew that the

testatrix transferred the stock to enable the son-in-law to receive the dividends for her.

The cause now came on to be heard.

Mr. *Simmonds*, for the Plaintiff:—

The only evidence to support the case of the Defendant, that a beneficial interest was intended to be given him, is his own, and that is not sufficient: *Grant* v. *Grant* (1). A purchase in the name of persons whom the purchaser might be presumed to desire to benefit jointly with a stranger will not confer a benefit on the stranger: *Kingdon* v. *Bridges* (2). That is really this case. Nor is every purchase made in the name of a child necessarily an advancement, as slight circumstances are sufficient to rebut it: *Stock* v. *McAvoy* (3); *Dumper* v. *Dumper* (4); *Loyd* v. *Read* (5). Neither is every relative or connection within the rule on which the Court presumes an advancement: *Currant* v. *Jago* (6); *Fowkes* v. *Pascoe* (before the Master of the Rolls, November 17, 1874).

Mr. *Ince*, for the Defendant:—

It is admitted that the unsupported evidence of the transferee in his own favour is insufficient; but where there is corroborative evidence *aliunde* then full weight must be given to it. The Defendant is here asking nothing from the Court, but is resting on his legal right, and the burden is on the Plaintiff to shew that he is improperly in possession: *Christy* v. *Courtenay* (7). It is to be observed that this is a transfer and not a purchase, and is so far more favourable to the case of the Defendant. Moreover, the transferor was in somewhat the position of a parent, and nothing was more natural than that she should make a gift to her son-in-law and his wife.

This case is most like that of *George* v. *Howard* (8), where stock was transferred by the intestate into his own name and that of his niece and her husband; and that was held to be a gift. It is quite clear that after the transfer the Defendant received the

(1) 34 Beav. 623.
(2) 2 Vern. 67.
(3) Law Rep. 15 Eq. 55.
(4) 3 Giff. 583.
(5) 1 P. Wms. 608.
(6) 1 Coll. 261.
(7) 13 Beav. 96.
(8) 7 Price, 646.

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dividends and paid them to the transferor; but the receipt of the dividends is not sufficient to rebut the presumption of gift: *Deacon* v. *Colquhoun* (1); *Grey* v. *Grey* (2).

[*Loyd* v. *Read* (3) was also referred to.]

Mr. *Simmonds*, in reply.

SIR CHARLES HALL, V.C.:—

The evidence does not, in my opinion, shew that the transfer of the stock by the mother into the names of herself, her daughter, and the Defendant, was for the mere purpose of saving herself trouble in the receipt of the dividends. The just conclusion from the evidence, I think, is, that her intention was to create a beneficial interest in each of the three persons into whose names the stock was transferred. The daughter was one of the transferees, and it is very unlikely she would have been associated with her husband without any intention of benefiting her. The cases of *George* v. *Howard* (4) and *Christy* v. *Courtenay* (5) shew that the receipt of the income is not sufficient to shew that the transferor did not intend to confer a beneficial interest. In the case of *Kingdon* v. *Bridges* (6) the transferee was an entire stranger. On the whole, I think that the Plaintiff's case fails, and the Defendant is entitled to the stock. The bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Newman & Payne.*
Solicitors for the Defendant: Messrs. *Hird & Son.*

(1) 2 Drew. 21.
(2) 2 Sw. 594 (Appendix).
(3) 1 P. Wms. 608.
(4) 7 Price, 646.
(5) 13 Beav. 96.
(6) 2 Vern. 67.

Ex parte HARRIS. *In re* JAMES.

C. J. B. 1874 Dec. 7.

Bill of Sale—Notice of Act of Bankruptcy—Payment of a prior Mortgage—Satisfaction entered up—Costs—Appeal successful on a new Ground—Evidence—Admissibility.

At the time when a bill of sale was executed, the mortgagee had notice of an act of bankruptcy committed by the mortgagor, upon which he was afterwards adjudicated a bankrupt. The money secured by the deed consisted in part of a sum paid by the mortgagee in discharge of the claim of the holder of two prior registered bills of sale executed before the act of bankruptcy was committed. The old bills of sale were not transferred to the new mortgagee, and satisfaction of them was entered up. The new bill of sale was registered:—

Held, that the new bill of sale was valid as against the trustee in the bankruptcy to the extent of the sum paid to the prior mortgagee.

When an Appellant succeeds only upon a ground not raised in the Court of first instance, he will have to pay the costs of the original hearing.

Evidence taken before, but not used upon the original hearing not admitted upon the hearing of an appeal.

THIS was an appeal from a decision of the Judge of the *Bath* County Court.

On the 17th of October, 1873, *Henry James*, a licensed victualler at *Bath*, executed a bill of sale of his goods, chattels and effects, in the public-house which he occupied, to the *Western Counties Monetary Company, Limited*, to secure the repayment of £100 which he borrowed from them, and on the 8th of January, 1874, he executed another bill of sale of the same property to the company to secure the repayment of a further advance of £50. Both these bills of sale were duly registered. On the 14th of January, at half-past ten o'clock in the morning, the company took possession of the property under their bills of sale. On the same day, but at a later hour, *James* committed an act of bankruptcy by filing a liquidation petition, upon which he was on the 4th of July adjudicated a bankrupt. On the 23rd of May he had executed a bill of sale of his effects and an assignment of the lease of the public-house to Messrs. *Harris, Cator, & Cator*, brewers, of *Chippenham*, to secure the repayment of £193 9*s*. This sum was made up of £122 9*s*. which remained due to the company upon their two bills of

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sale, and which Messrs. *Harris & Co.* paid off, and of £71 advanced by them. They took a receipt from the company for the £122 9*s.*, and the two bills of sale were handed over to them. No transfer, however, was executed to them of the company's two bills of sale, and satisfaction of them was entered up, the new bill of sale of the 23rd of May being given to *Harris & Co.* by *James* for the whole £193 9*s.* At the time when this bill of sale was executed, *Harris & Co.* had notice of the prior act of bankruptcy. The Judge of the County Court declared the bill of sale to Messrs. *Harris & Co.* to be void as against the trustee in the bankruptcy, on the ground that they had notice of the act of bankruptcy. Messrs. *Harris & Co.* appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellants:—

The evidence does not prove that Messrs. *Harris & Co.* had notice of the act of bankruptcy. At any rate their security must be good to the extent of what they paid in satisfaction of the prior bills of sale, which were unimpeachable. It is immaterial that no formal transfer was made to them: *Ex parte Mutton* (1).

Mr. *Winslow*, Q.C., and Mr. *Bagley*, for the trustee:—

We ask leave to read the depositions of some witnesses who were examined before the Registrar of the County Court prior to the hearing by the Judge. These depositions were tendered on the hearing, but the Judge refused to admit them. They are on the file of proceedings, and we are entitled to use them.

Mr. *De Gex*, Q.C., objected that these same witnesses were examined at the hearing before the County Court Judge, and were not then cross-examined with reference to their previous depositions.

SIR JAMES BACON, C.J.:—

I think that these depositions cannot properly be read now. The trustee might have availed himself of them before the County Court Judge by cross-examining the witnesses with reference to them. If, as I am told, the Judge refused to admit them, that

(1) Law Rep. 14 Eq. 178.

refusal has not been made the subject of an appeal, and I cannot travel out of the evidence upon which the Judge based his order.

Mr. *Winslow*, Q.C., and Mr. *Bagley*, were then called upon only to argue the question as to the validity of the bill of sale to the extent of the £122 9*s.* paid to the *Monetary Company*:—

This question was not raised in the County Court. But we say that the company's securities came to an end when they were paid off, and satisfaction was entered up. The mortgage to *Harris & Co.* was an entirely new transaction. They, having notice of the act of bankruptcy, cannot avail themselves of their security as against the trustee: *Fawcett* v. *Fearne* (1). *Ex parte Mutton* (2) is distinguishable.

SIR JAMES BACON, C.J.:—

In my opinion the Appellants are entitled, before the trustee can have the property which was included in the company's two bills of sale given up to him, to be paid the £122 9*s.* which they paid to the company. I think that the present case is really covered by *Fawcett* v. *Fearne*, and that the Appellants possess the same rights as the person who paid off the execution of the *Low Moor Company* in that case. Following my own decision in *Ex parte Mutton*, I shall declare the rights of the parties as I did then. But as this point was not raised, or even suggested, in the County Court, the Appellants must pay the costs of the hearing there. The notion that because a fresh security was taken the old one was discharged would involve my excluding all those equitable considerations to which I am bound to have regard in administering the law of bankruptcy.

Solicitors for the Appellants: Messrs. *Phillips & Son*, agents for Mr. *J. K. Bartrum, Bath.*

Solicitors for the Trustee: Messrs. *Stibbard & Cronshey*, agents for Messrs. *Simmons & Clark, Bath.*

(1) 6 Q. B. 20. (2) Law Rep. 14 Eq. 178.

C. J. B.
1874
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Dec. 14.

Ex parte PHILPS. *In re* MOORE.

Liquidation—Composition—Partners—Joint and Separate Estates—Powers of Trustee of Joint Estate over Separate Estate—Locus standi to oppose Registration of Resolutions—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 104 —*Bankruptcy Rules*, 1870, *rr.* 279, 285, 288, 295.

10 Ch. 487-8
10 L.D. 174.

On the appointment of a trustee of the joint estate under a liquidation petition filed by partners, the separate estate of each of the partners, as well as their joint estate, vests in him.

The separate creditors of one of the partners, therefore, though they may afterwards resolve to accept a composition in satisfaction of their separate debts, cannot vest the separate estate in any other trustee. But it is the duty of the trustee appointed by the joint creditors to administer the separate estate in accordance with the resolutions of the separate creditors, and then to carry over the surplus to the joint estate.

The joint creditors of two partners resolved upon a liquidation by arrangement, and appointed a trustee. Afterwards, the separate creditors of one of the partners resolved to accept a composition, and that the debtor should assign his separate estate to a trustee (not the same person as the trustee chosen by the joint creditors) to secure the payment of the composition:—

Held, that the latter part of this resolution was *ultrà vires*, and that the trustee of the joint estate had a *locus standi* to oppose its registration.

THIS was an appeal from a decision of the Registrar of the *Leeds* County Court, acting as Judge.

On the 22nd of August, 1874, *Charles Edward Moore* and *John Knowles Rowbotham*, sponge merchants, in partnership at *Leeds*, filed a joint liquidation petition. On the 19th of September the first meeting of the joint creditors was held, and a liquidation was resolved upon, and *William Philps* was appointed trustee. It was also resolved to transfer the proceedings from the *Leeds* Court to the *London* Court. These resolutions were afterwards duly registered in the *London* Court. A meeting of the separate creditors of *Moore* was held the same day, but no meeting of the separate creditors of *Rowbotham* was then held. On the 12th of October *Rowbotham* made a special application to the *Leeds* Court, under Rule 254 of the *Bankruptcy Rules*, 1870, to order a meeting of his separate creditors to be held. An order was made accordingly, and the meeting was held on the 29th of October. The creditors resolved to accept a composition of 2*s.* 6*d.* in the pound, and that

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the terms of the composition should be embodied in a deed by which the debtor should assign all his furniture and other effects to *Charles Lowrey*, to secure the due payment of the composition, and that *Lowrey* should be appointed trustee in the matter. These resolutions were confirmed at the second meeting, on the 7th of November. A caveat against their registration was entered on behalf of the trustee of the joint estate. On the day appointed for hearing the objections to registration, the Registrar refused to hear the solicitor of the trustee of the joint estate, on the ground that he did not represent any creditor of the separate estate of *Rowbotham*, and directed the resolutions to be registered. The trustee appealed.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the Appellant:—

The Registrar ought to have heard the Appellant in opposition to the registration. The trustee of the joint estate has a material interest in the administration of the separate estate, for the surplus, after paying the separate creditors, belongs to the joint estate. The *Bankruptcy Act* of 1869 does not expressly enact that the trustee in bankruptcy of joint estate shall also be the trustee of the separate estates. That was the old practice, and it is in effect recognised by sect. 104 (1) of the Act of 1869. With regard to liquidation by arrangement, Rule 285 of the *Bankruptcy Rules*, 1870 (2), prescribes what is to be done in the case of a liquidation

(1) Sect. 104: "Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the Court on the application of any person interested, be declared together; and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property."

(2) Rule 285 provides: "In cases of proceedings for liquidation, by arrangement or composition, instituted by partners, separate meetings of the different classes of creditors shall be held. . . . The joint creditors may come to such resolution as they may think fit with regard to the joint estate. The separate creditors may also come to such resolution as they may think fit as regards the liquidation of the estate of their individual debtor, but in the event of their determining upon his bankruptcy, or the liquidation of his estate by arrangement, they shall choose the same trustee, if any, as has been or shall be appointed by the joint or partnership creditors, but they may appoint a committee of inspection from their own body, if they

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petition presented by partners. The latter part of the rule clearly implies that the trustee of the joint estate is to administer the separate estate and pay the composition to the separate creditors. The resolution passed in the present case by the separate creditors was invalid so far as it directed an assignment of the separate estate to a different trustee; that part of it ought not to have been registered. The trustee of the joint estate either had a *locus standi* to oppose the registration under Rule 295 (1), or he ought to have had, as he asked, special leave to do so. At any rate, the application for registration was made in the wrong Court, after the joint creditors had, under the power given to them by Rule 288, resolved that the proceedings should be transferred to the *London* Court, and their resolutions had been registered.

Mr. *Robson*, and Mr. *Finlay Knight*, *contrà*:—

The proceedings have been quite regular under Rule 285; sect. 104 of the Act applies only to bankruptcy proper. The transfer to the *London* Court related only to the joint estate. Under a liquidation petition it is intended that the proceedings shall be entirely under the control of the creditors, and, in the case of partners, Rule 285 prescribes what such class of creditors may do. It limits the powers of the joint creditors to the joint estate. The separate creditors have full power to deal with the separate estate. They may accept a composition, and that implies that they may

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think fit, or they may adopt the committee (if any) appointed by the joint or partnership creditors. In the event of the separate creditors of any such debtor agreeing to accept a composition, in cases where the joint creditors have resolved on a liquidation by arrangement, the assets of such separate debtor shall be made available by the trustee for or towards the payment thereof, in such manner as the Court shall direct and approve, and any surplus of such separate estate remaining in the hands of the trustee, after payment of or provision for such composition, and all proper costs incurred in connection therewith, shall be deemed partnership assets."

Rule 279 provides that when creditors resolve to accept a composition, they "may name some person as trustee for receipt and distribution of the composition, and any negotiable securities which may be given for the same."

(1) Rule 295 provides: "Upon presentation of a special or extraordinary resolution for registration, the Registrar shall examine the same, and may hear any creditor who shall give him notice of his desire to be heard thereon."

appoint a trustee under Rule 279 to receive and distribute it. The surplus of the separate estate must, no doubt, go over to the joint estate, but it does not follow that the same person must be appointed trustee by each class of creditors. The trustee of the separate estate can make the surplus available for the joint creditors. The general intent of the Rule is, that each class of creditors shall administer as it pleases its own estate. The trustee of the joint estate in no way represents any of the separate creditors, and has no *locus standi* to oppose the registration of the resolutions of the separate creditors.

SIR JAMES BACON, C.J.:—

There are some things which are reasonably clear, and this is one of them. A petition for liquidation is presented by two partners in trade; the meeting of the creditors takes place, resolutions are passed, a trustee is appointed, and the resolutions are registered. The legal effect of that is to vest in the trustee so appointed the whole of the joint and separate estates of the debtors. Things being in that state, it was further resolved that the proceedings should be transferred from *Leeds* to *London*. Then the separate creditors of one of the debtors afterwards hold a meeting and appoint a trustee, and they propose that the separate estate shall be vested in that trustee. What possible right or power could they have by any resolution to take out of the trustee in whom it was by law already vested the separate estate of the debtor? The interests of the separate creditors are very carefully guarded by the 285th rule. They have entire dominion over the separate estate, although it is by law vested in the trustee appointed by the joint creditors, that is, the universal and only trustee, and by the 285th rule the trustee is directed to obey the wishes of the separate creditors, when expressed, and to divide the separate assets among them, and, if there is any surplus, it is as a matter of law expressly enacted that that surplus shall go over to the joint estate. To what end, then, is a meeting of the separate creditors held, at which they resolve to appoint a trustee, and direct an assignment to him to be executed which is of no earthly validity? The proceedings which had been duly transferred to *London* involved in them every matter in which the separate

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creditors could be interested. Their rights are protected by the 285th rule—they had nothing to do but, in the terms of the rule, to state in what manner they desired the separate estate to be applied. It is the duty of the trustee, who holds the separate estate as well as the joint estate, to apply it as so directed, and to reserve his own rights to the surplus. A more absurd proceeding than this meeting of the separate creditors cannot be conceived, except to this extent, that their acceptance of the composition may bind them—that is their own affair. When the trustee appointed by the joint creditors appears before the Registrar at *Leeds*, and suggests that the resolution which it is proposed to register was one that could not be passed, it is said that he has no *locus standi*—he, in whom by law is vested the whole of the estate joint and separate, is told that it is a matter that does not concern him how the separate estate is to be applied. In my opinion, the whole thing was utterly absurd from beginning to end. The order made in the Court at *Leeds* must be discharged. The proceedings under the Petition are transferred to *London*, and, if there was any necessity for me to do so, I would order that all the separate proceedings under it should be transferred. But I do not think it is necessary for me to do that, because by the first transfer all that affects the interests of the separate creditors, and all the questions that can arise in this liquidation, are transferred to the jurisdiction of the *London* Court, where I have no reason to doubt that they will be properly dealt with. I simply discharge the order, the rest will take care of itself. The trustee will understand that, under the 285th rule, it is his duty, not only to keep separate accounts of the two estates, but to apply the separate estate as, either by agreement or by direction, he may be ordered to do. It is lamentable to see the creditors' money so idly wasted. I make no order as to costs.

Solicitors for the Appellant: Messrs. *Evans & Eagles.*

Solicitors for the Respondent: Messrs. *Blakeley & Beswick*, agents for Mr. *Lee Hardwick, Leeds.*

Ex parte BOTTING. *In re* BOSTEL.

C. J. B.
1874
Dec. 14.

Composition—Powers of Trustee—Rejection of Proof—Reduction of Amount—Inquiry before Registrar—Bankruptcy Rules, 1870, *rr.* 279, 311, 313.

The trustee appointed under Rule 279 of the *Bankruptcy Rules*, 1870, to receive and distribute a composition, has no power to reject *in toto* the proof of a creditor who is included in the debtor's statement.

But, if the amount of the debt be in dispute between the debtor and the creditor, the trustee is entitled to an inquiry to ascertain what is really due.

THIS was an appeal from the decision of the Judge of the *Brighton* County Court.

On the 27th of June, 1874, *D. T. Bostel*, a sanitary engineer at *Brighton*, filed a liquidation petition. The first meeting of the creditors was held on the 15th of July. The creditors resolved to accept a composition of 7*s.* in the pound, payable in three instalments, and appointed *F. G. Clark* trustee in the matter. The second meeting was held on the 29th of July, and was then adjourned to the 11th of August; on which day the resolutions passed at the first meeting were duly confirmed. The resolutions were registered on the 14th of August. In the debtor's statement *William Botting* was entered as claiming to be a creditor for £500 or £600, against which the debtor stated that he held a charge on some houses for £250. The debtor added that he admitted £262, against which the charge of £250 was held. At the second meeting *Botting* tendered a proof for £488 8*s.* 4*d.*, which was objected to on behalf of the debtor. On the 3rd of September the trustee gave *Botting* notice that he rejected his claim against the estate, and declined to pay him the composition, on the ground that the debtor stated that the debt was not owing. On the 14th of September *Botting* gave notice to the trustee of an application to the Court to determine whether a trustee appointed under Rule 279 of the *Bankruptcy Rules*, 1870, had any power to decide for what amount the applicant could claim for the purpose of participating in the composition, and whether he had any power to reject the proof. On the 5th of November the Judge decided that a trustee

C. J. B. 1874

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has power under resolutions for composition, as well as under a liquidation by arrangement, to reject proofs. *Botting* appealed.

Mr. *Roxburgh*, Q.C., and Mr. *F. O. Crump*, for the Appellant:—

The trustee appointed under Rule 279 cannot reject the proof of a creditor who is put down in the debtor's statement. Nor has he any right to reduce the proof. Such a trustee is a mere conduit-pipe. A creditor who is inserted in the statement of a compounding debtor need not prove his debt: *Ex parte Peacock* (1). Rules 311, 313, apply only to liquidation by arrangement; they do not apply to composition.

[The CHIEF JUDGE:—It seems to me that they must apply just as much to composition, for it is the duty of the trustee to pay the composition only on the debts that are due.]

The effect of a resolution to accept a composition is entirely different from that of a resolution to liquidate by arrangement: *Ex parte Birmingham Gas Light and Coke Company* (2). An illustration of this difference is also afforded by Rule 297. A trustee under Rule 279 has no right to interfere between the debtor and his creditors as to proof of debts. The amount of a particular creditor's debt does not concern the other creditors; the estate of the debtor is not taken from him, and the amount of each debt is a matter which only affects him and the particular creditor. The trustee cannot require proof to be given by a creditor: *Ex parte Waterer* (3). The creditors mentioned in the debtor's statement are alone bound by the resolutions: *Bankruptcy Act*, 1869, s. 126; and the validity of the resolutions depends upon the proofs tendered at the meetings.

We are willing, however, that the Registrar shall ascertain the amount actually due.

Mr. *De Gex*, Q.C., and Mr. *Horton Smith*, for the trustee.

SIR JAMES BACON, C.J.:—

It appears to me that the trustee had no right peremptorily to reject the proof; he had no right to refuse to pay the Appellant

(1) Law Rep. 8 Ch. 682. (2) Law Rep. 11 Eq. 204.
(3) 22 W. R. 426.

any composition at all. I agree that the distinction between liquidation and composition is patent and clear. But the duty of the trustee is to pay the composition on the debts which are due. I think the rational course would be to go before the Judge of the County Court to ascertain the amount of the Appellant's debt. Mr. *De Gex*, if you are not willing to accept the offer made by Mr. *Roxburgh*, I must hear you.

[Mr. *De Gex:*—We are ready to accept the offer. But we ought to have our costs, as the offer was not made before.]

I shall reserve the costs till the case comes back to me. I think that the trustee had a right to examine into the amount of the debt. The debtor's statement, which is to be his guide, says one thing; the creditor says another thing. I shall discharge the order, and refer the case back to the County Court, to ascertain the amount due to the Appellant at the time when the composition was agreed to. He is entitled to receive the composition upon the amount so found due, and the debtor must pay it. The payment can be enforced as against him under sect. 126 of the Act. I reserve the costs. The case may be mentioned again with reference to the costs when the amount of the debt has been ascertained.

Solicitors for the Appellant: Messrs. *Smith, Fawdon, & Low,* agents for Mr. *C. Lamb, Brighton.*

Solicitors for the Trustee: Messrs. *Tilleard, Godden, & Holme,* agents for Messrs. *Black, Freeman, & Gell, Brighton.*

C. J. B.
1875
Jan. 18.

Ex parte EDEY. *In re* CUTHBERTSON.

Bill of Sale—Reputed Ownership—Order and Disposition—Possession of Sheriff under Execution—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

16 L.T. 678

On the 2nd of May a bill of sale of chattels was executed, and it was afterwards duly registered. The mortgagee did not demand possession of the goods until the 15th of June. The goods had been seized on the 5th of June by the sheriff under an execution issued by another creditor, and on the 13th of June the debtor had filed a liquidation petition. The sheriff remained in possession till the 20th of June:—

Held, that the sheriff's possession, being wrongful as against the mortgagee, did not prevent the goods from being in the order or disposition of the debtor at the commencement of the liquidation, and that they consequently passed to the trustee.

Observations on *Barrow* v. *Bell* (1) and *Ex parte Foss* (2).

THIS was an appeal from a decision of the Judge of the *Newport* County Court.

On the 2nd of May, 1874, *G. A. Cuthbertson*, who was carrying on trade in partnership with his father, *Robert Cuthbertson*, executed a bill of sale of his household furniture and other separate effects to *John Edey*, to secure the payment of £175 with interest. The bill of sale was duly registered. The property comprised in it remained in the mortgagor's possession. On the 5th of June the property was seized by the sheriff of *Gloucestershire* under a writ of *fi. fa.* issued by a creditor named *Bowes* for £805. The sheriff remained in possession until the 20th of June, when he withdrew. On the 13th of June *R. Cuthbertson* and *G. A. Cuthbertson* filed a liquidation petition, under which on the same day *R. B. Evans* was appointed receiver. He was afterwards appointed trustee. On the 15th of June the receiver took possession of *G. A. Cuthbertson's* separate property, and on the same day *Edey* for the first time demanded possession of the property comprised in the bill of sale, and a man was left in possession on his behalf, who remained in possession till the 22nd of June, when he withdrew in consequence of an order of the

(1) 5 E. & B. 540. 2 Jur. N. S. 159 (2) 2 De G. & J. 230.

Court restraining further proceedings under the bill of sale. The Judge of the County Court decided that the property comprised in the bill of sale was in the order and disposition of *G. A. Cuthbertson* at the commencement of the liquidation with the consent of the mortgagee, and that it therefore passed to the trustee.

Edey appealed.

Mr. *Finlay Knight*, for the Appellant:—

The possession of the sheriff was an adverse one, and took the goods out of the order and disposition of the debtor, and this state of things continued until after the true owner had demanded possession: *Fletcher* v. *Manning* (1). *Barrow* v. *Bell* (2) may appear to conflict with this, but it must be taken to have been overruled by *Ex parte Foss* (3). *Fletcher* v. *Manning* does not seem to have been cited in the argument of *Barrow* v. *Bell*. The nature of the property acquired by a sheriff under a writ of execution is shewn in *Ex parte Williams* (4), and *Ex parte Dorman* (5) shews that to bring the case within sect. 15, subsect. 5, of the Act, the possession of the debtor must be a sole possession.

Mr. *De Gex*, Q.C., and Mr. *Doria*, for the trustee, were not called upon.

SIR JAMES BACON, C.J.:—

This is a simple question of fact. On the 13th of June the liquidation petition was filed, and at that time the sheriff was in possession of these goods. He was afterwards turned out of possession. This possession was from the first illegal, and cannot be taken to have disturbed that of the debtor. In *Ex parte Foss* the true owner came before the act of bankruptcy, and said, The property is mine, give me possession of it. His consent was thereupon determined. In the present case, from the 5th of June to the 20th, the sheriff was in possession, but wrongfully. On the 13th of June the title of the trustee accrued. Until the 15th of June

(1) 12 M. & W. 571.
(2) 5 E. & B. 540.
(3) 2 De G. & J. 230.
(4) Law Rep. 7 Ch. 314.
(5) Law Rep. 8 Ch. 51.

C. J. B. 1875 *Ex parte* EDEY. *In re* CUTHBERTSON.

no one else said that he was the true owner of the goods; up to that time the true owner's consent to their being out of his possession subsisted. There is no difficulty in reconciling *Barrow* v. *Bell* (1) with *Ex parte Foss* (2). This appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Linklater & Co.*, agents for Messrs. *J. Brook Greaves & Allen, Sheffield.*

Solicitor for the Trustee: Mr. *E. Warriner*, agent for Mr. *Joseph Gibbs, Newport, Monmouthshire.*

C. J. B. 1875 *Jan.* 18.

Ex parte HINTON. *In re* HINTON.

Practice—Time for Appealing—Bankruptcy Rules, 1870, *r.* 143.

Notice of an appeal must be given within twenty-one days from the day on which the order appealed from was pronounced, not from the day on which it was drawn up.

THIS was an appeal from a decision of the Judge of the *Stoke-upon-Trent* County Court.

Matthew Hinton, formerly an innkeeper at *Longton*, filed a liquidation petition on the 21st of May, 1874. Some resolutions, which purported to have been passed at the first meeting of the creditors, were afterwards tendered to the Registrar for registration, but he refused to register them, on the ground that they had not been duly passed. The debtor appealed to the Judge, and the appeal was heard on the 3rd of November, and was dismissed. The order dismissing it was not drawn up until the 27th of November, and it was as follows:—

"Memorandum. That on the 3rd November instant an application was made to the Judge of this Court (by way of appeal) for an order to be made in terms of the notice of the said application, that certain resolutions alleged to have been passed in the matter of the above proceedings should be registered by the Registrar of the Court; and upon hearing counsel it was and is hereby ordered that the said application be refused, and the appeal to the said

(1) 5 E. & B. 540. (2) 2 De G. & J. 230.

Judge dismissed; and the same are hereby refused and dismissed accordingly.

"Given under my hand and the seal of the Court this 27th November, 1874. "By the Court.

"*James C. Marshall,*
"Deputy Registrar."

From this order notice of appeal was given on the 12th of December, 1874.

The Respondent, an opposing creditor, filed an affidavit to shew that the order was actually made by the Judge on the 3rd of November.

Mr. *W. Bush Cooper*, for the Appellant.

Mr. *De Gex*, Q.C., and Mr. *Cracknall*, for the Respondent, objected that the appeal was brought too late: Rule 143 (1) of the *Bankruptcy Rules*, 1870.

This means that the twenty-one days are to run from the date of the pronouncing of the order, not from the date when it is drawn up. This accords with the interpretation which has been given to the similar provision contained in the Winding-up Acts: *Ex parte Hookey* (2); *Ex parte Dudley Banking Company* (3).

Mr. *W. Bush Cooper*, for the Appellant:—

A notice of appeal cannot be given till the order is drawn up, for till then there is nothing to shew what the Judge decided. If the Respondent's contention is right, the Judge or the Registrar, by delaying the drawing up of the order, or the person who has the carriage of the order by delaying to apply for it, could deprive the other side of the right of appeal.

Rule 143 differs in its terms from the provision in the Winding-up Acts. Sect. 124 of the *Companies Act*, 1862, says that the notice of appeal must be given within three weeks after the order

(1) Rule 143: "An appeal against a decision or order of the Chief Judge in Bankruptcy, or a Judge of a County Court, shall be entered with the Registrar of Appeals within and not later than twenty-one days from the said decision or order, by leaving with him a copy of the appeal notice of motion."

(2) 4 D. F. & J. 456.

(3) 3 D. J. & S. 456.

C. J. B. 1875 *Ex parte* HINTON. *In re* HINTON.

complained of "has been made." The corresponding sections 99 and 34 in the Joint Stock Companies Acts of 1848 and 1849 contain similar words. Rule 143 says, "within twenty-one days from the said decision or order," thus giving an alternative, and evidently contemplating that there may be a delay in the drawing up of the order. Moreover, the order in the present case is dated the 27th of November, and says that the application "is hereby dismissed," implying that, whatever the Judge may have said on the 3rd of November, he did not come to a final conclusion on the application until the 27th of November.

SIR JAMES BACON, C.J.:—

I have heard all that could be said on this subject, because of the reluctance that one must naturally feel to give effect to a purely technical objection. But the law of the Court is very clearly expressed in the Rule, and in the decisions which have been referred to. The reason of the policy of the law in this respect is very obvious. It was in the Appellant's power to have got the order drawn up on the 3rd of November, or, at any rate, within the period of twenty-one days after. The words of Rule 143 are clear. The order must be considered as made upon the day on which it was pronounced. Indeed, on the face of the order it is stated that the application was heard and disposed of on the 3rd of November. I am precluded from hearing this appeal, and it must be dismissed. But I shall give no costs, for the Appellant has been misled by the act of the Registrar.

Solicitor for the Appellant: Mr. *B. A. Shires, Leicester.*
Solicitor for the Respondent: Mr. *F. C. Greenfield.*

Ex parte LEONARD. *In re* LEONARD.

C. J. B.
1875
Jan. 25

Fraudulent Debtor—Prosecution—Representation by a Creditor to the Court—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 13, 16.

The representation by a creditor to the Court, mentioned in sect. 16 of the *Debtors Act*, 1869, as a foundation for an order directing the prosecution of a bankrupt for alleged offences under the Act, must be made in writing, supported by proper evidence, and filed with the proceedings in the bankruptcy.

20 L.D. 788.
190, 2-3

THIS was an appeal from an order made by the Judge of the *Bury St. Edmunds* County Court, directing the prosecution of *Jonas Leonard*, a cattle dealer at *Soham*, a bankrupt, for certain alleged offences under the *Debtors Act*, 1869.

The order purported to be made "upon the application of the solicitor for the trustee of the property of the bankrupt, and upon hearing the examination of the bankrupt, and upon the representation of creditors of the bankrupt, the Court being satisfied that there is ground to believe that the bankrupt has been guilty of such offences, and that there is a reasonable probability that he may be convicted thereof," and it went on to order that the trustee should prosecute the bankrupt for the offences specified.

The bankrupt had been examined before the Judge, and his examination was filed with the proceedings. Mr. *Alfred Wainwright*, one of the creditors, was also examined in Court upon the hearing of the trustee's application for the order, and notes of his evidence were taken by the Judge, but no record of this evidence was filed with the proceedings, nor was it mentioned in the order. A certified copy of the Judge's notes was tendered on the hearing of the appeal. No representation in writing had been made by any of the creditors.

The bankrupt appealed from the order.

Mr. *Robertson Griffiths* and Mr. *Horace Browne*, for the Appellant, contended that there had been no representation by a creditor such as is required by sect. 16 of the *Debtors Act*, 1869 (1).

(1) Sect. 16: "Where a trustee in any bankruptcy reports to any Court exercising jurisdiction in bankruptcy, that in his opinion a bankrupt has been guilty of any offence under this Act, or where the Court is satisfied upon the

C. J. B.
1875
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The CHIEF JUDGE suggested that the representation by the creditor ought to be made in writing. There was nothing on the face of the order as it now stood to shew what the representation was.

Mr. *G. W. Lawrance*, for the trustee, contended that the order was regular, as it followed the very words of sect. 16. The certified copy of the Judge's notes was sufficient to shew what was the representation upon which the Judge acted in making the order.

SIR JAMES BACON, C.J., said he thought that the representation mentioned in sect. 16 ought to be made in writing, supported by proper evidence, and filed with the proceedings.

The order must be discharged, but without prejudice to a fresh application in the County Court.

Solicitors for the Bankrupt: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Mr. *Joseph Rogers, Ely*.

Solicitors for the Trustee: Messrs. *Walter, Moojen, & Son*, agents for Messrs. *Salmon & Son, Bury St. Edmunds*.

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representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the Court shall, if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence."

HASLUCK *v.* PEDLEY.

M. R.
1874
Dec. 7.

[1874 H. 136.]

Will—Specific Devise—Apportionment—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 4, 7—*Will made before Act—Gift of Rent-charge—Instalments due before Rent Day—Mode of Payment.*

Held, that the *Apportionment Act*, 1870, applied to a specific as well as to a residuary devise:

Held, also, that the Act applied to a devise contained in a will dated before the Act to which a codicil was made after the Act.

Semble, the result would have been the same without the codicil.

Where a testator charges an annuity on land with the ordinary power of distress and entry in the event of the annuity being in arrear, the annuitant must wait for payment of the annuity until the first rent day which occurs after the day fixed by the testator for payment of an instalment of the annuity, and is not entitled to require that any prior rent should be kept in hand in order to answer the instalment.

THIS was a special case for the purpose of obtaining the opinion of the Court on certain questions which had arisen in administering the estate of *Samuel Pedley*, who died on the 6th of June, 1873, having made a will, dated the 31st of December, 1869, and four codicils, of which the last three were dated in 1871 and 1872.

The testator was entitled to real estate producing an income of £13,000, or thereabouts, which he had disposed of by various specific devises and by a residuary devise; and he was also entitled to considerable personalty, which he disposed of by a residuary bequest.

Under the will the testator's widow became (in the events which happened) entitled to a yearly rent-charge of £4500 issuing out of certain real estate specifically described, and payable quarterly; the first quarterly payment becoming due three months after the testator's death; with a power to enter and distrain and receive the rents and profits in the event of the annuity being in arrear.

The questions, so far as necessary to be here mentioned, were, 1, whether any and which of the rents first accruing after the testator's death on his several specifically devised and residuary real

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estates ought to be apportioned; 2, out of what rents of the hereditaments charged therewith the first and subsequent payments of the annuity of £4500 should be provided for, having regard to the question of apportionment.

Mr. *Colt*, for the Plaintiffs:—

The Act does not apply to a will made before the Act: *Jones* v. *Ogle* (1). Neither does it apply to specific gifts: *Jones* v. *Ogle*; *Whitehead* v. *Whitehead* (2). It must be admitted, however, that different conclusions were come to in *Capron* v. *Capron* (3); *Pollock* v. *Pollock* (4).

At all events, the Act does not apply so as to affect the relations between the real and personal representatives of a testator whose interest in the property is not terminated by his death. That was clearly so under the old law: *Browne* v. *Amyot* (5); and though the words of the present Act are very wide, they must receive some limitation in construction. The fourth section of the Act begins by saying that "all persons, and their respective heirs, executors, administrators, and assigns," shall have certain remedies. These words, in terms, would include the whole world; but that they are not to receive so wide an interpretation is clear, because the Act goes on: "and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths." When we look to the preamble of the Act, we see that the mischiefs intended to be remedied are only "such mischiefs and inconveniences" as are attempted to be remedied by the former Apportionment Acts; and, as already shewn, these Acts did not apply, and were not intended to apply, as between the heir and executor of an owner in fee. Hence, under the last Act, there can be no apportionment between heir and executor.

As regards the other question, in the events which have happened the quarterly payments of the widow's annuity fall due about three weeks before quarter day; and the question on which the opinion of the Court is desired is whether the annuitant must wait till the following quarter day for her annuity, or

(1) Law Rep. 8 Ch. 192.
(2) Ibid. 16 Eq. 528.
(3) Law Rep. 17 Eq. 288.
(4) Ibid. 18 Eq. 329.
(5) 3 Hare, 173.

whether she is entitled to be paid out of the rents which fell due on the previous quarter day.

Mr. *W. C. Druce*, for the Defendants, was not called upon.

SIR G. JESSEL, M.R.:—

As to the first question, the 2nd section of the *Apportionment Act*, 1870, enacts that after the passing of the Act all rents are, like interest on money lent, to be considered as accruing from day to day, and are to be apportionable in respect of time accordingly. The result of that is, that the rent up to the death of the testator becomes arrear of rent, and is to be dealt with in the same way as arrear of rent would have been dealt with before the Act. A testator may, of course, give arrear of rent specifically, and if so given the arrear of rent will go to the specific legatee; otherwise it will fall into the general personal estate.

Then the 4th section says that though the rent up to the testator's death is to be treated as arrear of rent for the purpose of apportionment, it is not to be so treated for the purpose of making the tenant pay before the rent day. That is the whole effect of the 4th section, the language of which is, no doubt, open to criticism. It begins by saying that "all persons" shall have certain remedies, and then goes on to say, "and also the executors, administrators, and assigns of persons whose interests determine with their own deaths." Those words were thrown in to prevent any question as to whether the executors, administrators, or assigns of such persons were to have the remedies given by the section. The enactment would have been better expressed if the word "including" had been used instead of the words "and also;" but there is no such ambiguity or difficulty as to compel me to hold that the 2nd section is not to receive its plain and natural meaning.

Further, the Act enacts (sect. 7) that it is to apply in all cases except where it is expressly stipulated that no apportionment shall take place. Here there is no such stipulation; but the will was made before the passing of the Act, although several codicils were made afterwards. It is said that testators make their wills on the supposition that the state of the law will not be altered; and it is contended that this will ought to be construed as it would

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have been under the old law. The answer to that is, that a testator who knows of an alteration in the law (as this testator must be presumed to have done), and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law.

Then it is said that the Act does not apply to specific devises; but I am of opinion that specific devises are as much under this law as any others. The Act does not affect the meaning of the will; it only alters its legal operation. A devise of *Blackacre*, before the Act, carried the accruing rents: now it does not: not because the meaning of *Blackacre* has been altered, but because the legal effect of the devise is different.

The answer to the first question, therefore, will be, that all the rents are to be apportioned as on the day of the testator's death, and that the apportioned part falls into the residuary personal estate.

Then as to the other question, the annuitant could not obtain payment by exercise of the power of distress until after the rent became due; consequently she must wait for payment of the annuity until the rent day; and the answer to the question will be, that no portion of the rent is to be kept in hand for the purpose of paying the annuity.

Solicitors: Messrs. *Turner & Son.*

M. R. 1874 Dec. 12

In re MACLEAN'S TRUSTS.

Customs Annuity and Benevolent Fund—Provision for Claimants under Subscriber—Power of Subscriber to mortgage—Succession Duty—Predecessor and Successor—Mortgagor and Mortgagee—Succession Duty Act (16 & 17 *Vict. c.* 51), *ss.* 2, 17.

The *Customs Annuity and Benevolent Fund* was established by Act of Parliament for the benefit of the widows, children, and other relatives of officers of the Customs, who are expected to subscribe an annual sum to it out of their salaries. By the Act directors were appointed with power to frame rules for the management of the fund, with a discretion to admit persons other than relatives of the subscribers as their nominees to the benefit of the fund. It was also enacted that, in order to insure to the widows of

the subscribers, or any other claimants on the fund, the full benefit intended by the Act as an alimentary provision for the widows or other claimants entitled thereto, the interest of any widow or other claimant should not be assignable without the consent of the directors.

Rules were drawn up which provided that one-third of the portion payable on the death of a subscriber should be set aside for his widow, and that the remaining two-thirds should be subject to the directions of the subscriber (to be given by will, or codicil, or any instrument in writing signed by him in the presence of an attesting witness and deposited with the directors during his life, or within three months after his death, and which instrument might at the option of the subscriber be made irrevocable), and should be applied or paid in any manner or proportion which he might think fit for the benefit of his widow, children, or relatives, or nominees who should have been duly admitted by the directors.

A subscriber to the fund, by instrument duly executed and deposited with the directors, irrevocably assigned two-thirds of the portion payable on his death to mortgagees to secure an advance made to him, and the mortgagees were duly admitted by the directors as his nominees:—

Held, that the mortgage was valid as against the widow, children, and relations of the subscriber:

Held, also, that by virtue of sect. 17 of the *Succession Duty Act*, the interest of the mortgagees in the fund was not liable to succession duty.

Attorney-General v. *Abdy* (1) distinguished.

BY the Act of Parliament 56 Geo. 3, c. lxxiii. (local), a fund known as the *Customs Annuity and Benevolent Fund* was constituted, to which each officer in the Customs is expected to subscribe a certain sum annually.

The preamble of the Act recited that the establishment and regulation of a fund for the conditional benefit and relief of the widows and children or other relatives of the established officers, clerks, and other persons employed in the department of the Customs in *England* would be highly beneficial.

The Act appointed a body of directors for holding and managing the fund, and gave them power to make rules for the regulation of the fund.

By the 9th section of the Act it was provided "that the said directors shall and may, if they shall deem it expedient, admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative or relatives of the said subscriber, and the said nominee or nominees so admitted as aforesaid shall and are hereby declared to have and thereafter

(1) 1 H. & C. 266.

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to continue to have to all intents and purposes the same and the like interest in the said fund and the advantages thereof as if the said nominee or nominees had been a relative or relatives of the said subscriber, under and subject in every respect to the rules and regulations approved and ratified as aforesaid."

The 11th section is as follows:—"And in order to insure to the widows of the subscribers, or any other claimants on the said fund, the full benefit intended by this Act as an alimentary provision for the widows or other claimants entitled thereto, be it further enacted that no annuity or sum of money payable to any widow or other claimant under any of the provisions of this Act shall be assignable except with the permission and approbation of the said directors, or any three or more of them, or liable to be affected by arrestment, or otherwise attachable by any creditor, or be subject to the *jus mariti* of any husband with whom any such widow or other claimant may intermarry, or be subject in any manner to any debts, or deeds, or contract of any such husband, but the same shall be paid to such widow or other claimant entitled thereto upon her own receipt only, notwithstanding such arrestment, attachment, or marriage."

Rules were drawn up in accordance with the Act regulating the rate of subscription to be paid by members and the mode of application of the fund.

Rule 1 was as follows:—"The *Customs Annuity and Benevolent Fund* shall be raised by subscription upon the principle of life insurance, and together with the contribution of poundage granted by the aforesaid Act, shall form a fund for the widows, children, and relatives and nominees of officers or persons belonging to the department of Customs in *England;* and the admission by the directors of a nominee or nominees of subscribers under the said Act shall, as to the person of such nominee or nominees, take place during the lifetime of such subscriber. And any such admission may from time to time be revoked and annulled by the subscriber at his will and pleasure, or by the directors at their discretion, where they shall have just cause to believe that such admission has been procured in fraud of the principle and policy of the fund. Every nominee of a subscriber shall be entitled to such proportion only of his insurance in the fund as shall be

limited and directed by such subscriber in conformity with these regulations."

Rule 12 provided as follows:—"The capital money forthcoming at a subscriber's death by virtue of his insurance shall, subject to the following regulations, be appropriated according to the directions contained in his will or codicil, or in any instrument in writing signed by him in the presence of an attesting witness and deposited with the directors during his lifetime, or deposited within three months after his death, and which instrument may, at the option of such subscriber, be made absolutely irrevocable, or in default of any such directions, in manner hereinafter prescribed." And after a proviso not material to be here stated, the said 12th rule proceeded as follows:—"One-third part of the said capital money shall be set apart as the widow's portion, and shall be appropriated in the creation of an annuity for her benefit according to the rates of Table C. hereunto annexed, and the remaining two-thirds of such capital money shall be subject to the directions of the subscriber under these regulations, and shall be applied or paid in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, or of his nominee or nominees who shall have been duly admitted by the directors." And after certain provisions immaterial to be stated, the 12th rule proceeded as follows:—"Where a subscriber shall not by will or such other instrument as aforesaid have directed the application of the capital money herein placed at his disposal, excepting as aforesaid, the same shall become the property in equal proportions of his child or children living at his death, and of the child or children or other issue then living of such of his children (if any) as shall have died in his lifetime, such grandchildren or other issue nevertheless to be only entitled among them in equal proportions to the share which his, her, or their respective parent or ancestor would have taken if living at the death of such subscriber."

Prior to August, 1872, *William Maclean* effected two insurances in the fund on his own life for the sums of £1000 and £1000, and numbered respectively 557 and 654. On the 28th of August, 1872, these insurances, together with the sum of £2235, the amount of the bonuses and profits up to that time allotted in

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respect of the same insurances, amounted altogether to the sum of £4235.

On the 28th of August, 1872, *William Maclean* duly executed, and he afterwards deposited with the directors of the fund, an instrument in the following terms:—

"In pursuance and in exercise of the powers vested in me by the rules of the *Customs Fund*, and revoking all former directions made by me, I hereby direct that the sum of £1400 out of the capital money forthcoming by virtue of my insurances in the fund shall at my death be paid to Sir *Walter Rockcliff Farquhar*, Baronet, *Henry Vigne*, *Charles William Curtis*, and *Henry Bonham Carter*, Esquires, the present life fund trustees of the *Guardian Fire and Life Assurance Company*, or other the life fund trustees for the time being of the said company; and I request the directors to admit the said Sir *Walter Rockcliff Farquhar*, Baronet, *Henry Vigne*, *Charles William Curtis*, and *Henry Bonham Carter*, Esquires, or other the life fund trustees for the time being of the *Guardian Fire and Life Assurance Company*, my nominees for the purpose of this appointment. I also hereby declare the said appointment absolutely irrevocable, except with the consent in writing of the said Sir *Walter Rockcliff Farquhar*, Baronet, *Henry Vigne*, *Charles William Curtis*, and *Henry Bonham Carter*, Esquires, or other the life fund trustees for the time being of the *Guardian Fire and Life Assurance Company*."

William Maclean represented to the directors of the fund that the consideration for the appointment thus made was to be the loan to him by the *Guardian Assurance Company* of a sum of money which he intended to apply in releasing or disincumbering some family property for the ultimate benefit of his family; and the directors duly admitted the persons named in the appointment to be the nominees of *William Maclean* in respect of the sum of £1400 mentioned in the appointment.

After such admission the *Guardian Assurance Company* paid to *William Maclean* the sum of £900, in consideration of which *Maclean* executed a deed, containing a covenant by him that his heirs, executors, and administrators would within three calendar months after his death pay to the company the sum of £1220, with

interest at 5 per cent. from his death until payment; and a declaration that the sum of £1400 coming to the trustees of the company under the appointment should be applied first in payment of costs, and then in satisfaction of the £1220 and interest; and that the surplus should (subject to succession duty) be paid to the executors or administrators of *William Maclean*.

By another instrument, duly executed and deposited with the directors of the fund, and dated the 28th of December, 1873, after reciting the appointment of £1400 by the instrument of the 28th of August, 1872, *William Maclean* directed that the remainder of the capital money forthcoming at his death should be invested in the purchase of 3 per cent. stock, and the income thereof paid to his wife during her life, and after her death the stock should be divided between his children living at his death, or their issue.

By his will, dated the 28th of December, 1873, *William Maclean* confirmed the instrument of the 28th of December, 1873, and bequeathed all the rest of his property to his wife absolutely, and appointed executors.

William Maclean died on the 3rd of June, 1874, leaving a widow and children. The executors named in his will renounced probate; his widow also renounced the right of administration, and administration was granted to a creditor. The estate proved to be insolvent, and was being administered in Chancery.

On the 17th of June, 1874, the solicitors of Mr. *Maclean's* family wrote to the secretary of the *Customs Fund* a letter, in which they stated that they had been advised by counsel that the appointment of £1400 by Mr. *Maclean* to the trustees of the *Guardian Office* was invalid, as being against the principle and policy of the Act establishing the fund, and they gave notice to the secretary not to part with the £1400, or any part of it, without their consent; and they suggested that that sum should be paid into Court under the *Trustee Relief Act*.

This claim was subsequently brought by the same solicitors before the Chief Clerk in the suit for administration of *Maclean's* estate, who directed the opinion of counsel to be taken as to the course to be pursued.

The opinion of a Queen's Counsel and a junior was accordingly taken, and they advised that the fund ought to be paid into Court

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under the *Trustee Relief Act.* On the 27th of July, 1874, a copy of the opinion was sent to the secretary of the *Customs Fund*, and the directors subsequently paid the £1400 into Court accordingly.

A question also arose whether the sum appointed to the trustees of the *Guardian Office* was subject to succession duty.

A Petition was now presented by the trustees of the *Guardian Life Office*, praying that the costs of all parties of and consequent on the Petition might be paid by the directors of the *Customs Fund* as between solicitor and client; that in case the Court should be of opinion that the fund was liable to succession duty, such duty might be paid out of the fund in Court; and that the residue of the fund might be paid to the Petitioners.

Mr. *Fischer*, Q.C., and Mr. *Loudon*, for the Petitioners, contended that the claim by *Maclean's* family was wholly unfounded; that the directors of the *Customs Fund* ought not to have paid the fund into Court at all; and that they ought to pay the costs of the Petition.

Mr. *Southgate*, Q.C., and Mr. *Begg*, for the directors of the *Customs Fund*, were not called upon.

Mr. *Cracknall*, for the legal personal representatives of Mr. *Maclean*, made no claim to the fund.

Mr. *E. Beaumont*, for the family of Mr. *Maclean*, submitted to the Court the question, whether the appointment by Mr. *Maclean* to the Petitioners was valid. The object of the Act, he said, was to enable officers in the Customs to make an alimentary provision for persons having claims on them; this object would be entirely defeated if such officer could borrow money for his own purposes on the security of the fund.

[He referred to *In re Pocock's Policy* (1).]

SIR G. JESSEL, M.R.:—

In my opinion there was no reasonable foundation for the claim made on behalf of the legal personal representatives and the family of Mr. *Maclean.*

(1) Law Rep. 6 Ch. 445.

The 12th rule of the Act of Parliament, enabling the trustees to admit a nominee who was not the relative of the claimant, says: "The capital money forthcoming at a subscriber's death by virtue of his insurance shall, subject to the following regulations, be appropriated according to the directions contained in his will or codicil, or in any instrument in writing signed by him in the presence of an attesting witness and deposited with the directors during his lifetime." Now, in this particular instance, there was an instrument signed by Mr. *Maclean* in the presence of an attesting witness and deposited by him with the directors in his lifetime; and that instrument was an irrevocable assignment, if I may so call it, to the Petitioners, the trustees of the *Guardian Life Office*, of £1400.

It is suggested that because the real transaction between the testator and the *Guardian Life Office* was a mortgage and not an assignment out and out, that this was contrary to the principle of the Act; but I do not think it was. The principle of the Act was to allow the subscriber to dispose absolutely, and as he thought fit, of two-thirds of the capital if he had a wife and children. If he did not dispose of it, then it went according to the directions contained in his will, that is, it remained his absolute property. If he disposed of it by way of mortgage, in this Court that would be a disposition *pro tanto;* and therefore, whatever he did not thus dispose of, that is, his interest as mortgagor, would still remain his absolute property, and be subject to the dispositions of his will. To that extent, therefore, the assignment would be a direction to pay to his nominees, as trustees for his executors or administrators, instead of to the executors or administrators direct; and why should he not in his lifetime direct the whole disposable share coming to him to be paid to nominees who were, in a certain event, to become trustees for his legal personal representatives? It seems that he had the power so to direct, and that there is no substantial objection to the mode in which that power has been exercised.

Then comes a question of costs upon this point; I say upon this point, because there is a subsequent question which I have not yet heard. The counsel who now appear on behalf of the Respondents have very fairly put the question: one has submitted the claim

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to the consideration of the Court, and the other has said he cannot support it. But the Respondents instructed their solicitors to write letters to the directors of the Customs Department. The first is dated the 17th of June, and it appears that it was written under the advice of counsel, and, I am told, counsel of considerable eminence. By it, after giving notice not to part with the fund, they go on to say:—"It appears to us that this point can only be satisfactorily settled by the Court of Chancery, and we would therefore suggest that you should at once pay the £1400 into Court under the *Trustee Relief Act*." The counsel for the Petitioners in this case contend that the directors receiving such a letter as that were entitled wholly to disregard it, and to say, "If you do not file a bill to impeach the transaction within a certain time, we shall pay over the fund." It appears to me that they would have been very foolish if they had not acted in the matter, there being a *bonâ fide* claim supported by the opinion of counsel upon the construction of the Act. But it does not stop there, for, on the 27th of July, they get another letter, inclosing an opinion of two counsel, to the effect that the proper course was to pay the fund into Court under the *Trustee Relief Act*, and requiring the directors, in accordance with such opinion, at once to pay the £1400 into Court under the *Trustee Relief Act*. Now I quite agree that it is not because a man brings forward a claim to a trust fund that the trustee of that fund, should the claim be unfounded, is justified in paying the trust fund into the Court of Chancery; but how can trustees treat a claim as unfounded which is supported by the opinions of three counsel, and which is brought forward *bonâ fide* by a responsible solicitor, and when they are told, "If you do not adopt this course, you will subject yourself to the risk of paying costs personally"? It is quite clear that the trustees were fully justified after this letter in taking the course they have adopted in paying the £1400 into Court, and that the Petitioners have entirely mistaken their course in asking that the trustee should pay the costs of the application as the Petition asks.

But that does not at all dispose of the question of costs. I am clearly of opinion that the persons who raised that contention must take the consequences of raising it. They relied upon the opinion of counsel, I am told of eminence, and having relied upon that

opinion, they are not indemnified by it from the consequences of that reliance. That opinion is of such a character that when it comes to be discussed in open Court one of the learned counsel says he will not argue the point at all, and the other learned counsel says that he will submit the point to the Court. In fact, neither of the learned counsel ventures to argue it at all. I do not know who the gentleman may be who first entertained the opinion, but counsel, as well as judges, sometimes make mistakes; and I do not think there was any reasonable ground for the opinion. That being so, the parties who relied upon that erroneous opinion must take the consequences of having acted erroneously; and as it was their act which caused the money to be paid into Court, they must pay the cost of the present application, and all the costs incurred by everybody in reference to the payment into Court. If necessary, I should allow the Petition to be amended by praying that accordingly. There is, however, a further question, which may relieve them to some extent as to the costs. As I understand, if no succession duty is payable, there will be a surplus after payment of the *Guardian Office;* and I must hear counsel as to whether any duty is payable.

Mr. *W. W. Karslake,* for the Crown:—

It was decided in *Attorney-General* v. *Rowsell* (1) that a fund such as this is not subject to legacy duty; but *Attorney-General* v. *Abdy* (2) establishes that it is subject to succession duty. The appointment made by Mr. *Maclean* was clearly a "disposition," by virtue of which the Petitioners became entitled to the fund on the death of Mr. *Maclean.* The case falls within the 2nd section of the *Succession Duty Act,* and the Petitioners are liable to pay duty at the rate of 10 per cent.

SIR G. JESSEL, M.R.:—

I think that the *Guardian Life Office* are the assignees of the policy within the 17th section of the *Succession Duty Act,* and consequently no duty is payable by them. It appears to me that the point was decided by the unanimous opinion of the Court of

(1) Tilsley on the Stamp Acts, 2nd. Ed. p. 685. (2) 1 H. & C. 266.

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Exchequer in the case of *Attorney-General* v. *Abdy* (1), although that case was a totally different one from this. There a testator had bequeathed the sum assured to his sister. A previous decision had determined that such a bequest was not liable to legacy duty, but it was decided that there was no such exemption under the Succession Duty statute, and accordingly the fund was held liable to succession duty. That is all that was decided in that case; but in arriving at that conclusion every Judge treated this as an ordinary policy of insurance. Chief Baron *Pollock* says this (2): "It seems to me that this case does not differ, except in some points already adverted to"—that I do not touch upon—"from an ordinary insurance. When a man insures his life and by his will disposes of the sum insured, no doubt can exist, for the 17th section of the *Succession Duty Act* expressly says, 'that any disposition or devolution of the moneys payable under such policy if otherwise such as in itself to create a succession shall be deemed to confer a succession.' That is an enactment which brings a disposition or devolution of moneys payable under an ordinary policy of insurance within the provisions of the *Succession Duty Act;* and in what does this case differ?" Baron *Martin* says (3): "Mr. *Abdy*, an officer of the Customs, effected an insurance on his life for a capital sum of £500, payable out of the *Customs Annuity Benevolent Fund* . . . . I apprehend I am bound to act, and I do act, on the judgment of this Court, in the year 1844, in the case of *Re Rowsell*, which put a construction upon policies effected under the 56 Geo. 3, c. lxxiii., which creates a particular species of property, limited as to the persons who are to enjoy it, but over which the person who purchased it had, to a certain extent, a control. The subscription of Mr. *Abdy* to the fund entitled him, not to any personal benefit during his life, but only to dispose of the sum assured amongst his relatives or nominees on his death; and by his will he gave all that policy of assurance effected on his life in the *Customs Fund* for the sum of £500 and all moneys to become payable under the same, unto his sister, the now Defendant, absolutely. Therefore what was done by him in his lifetime created a species of property which by his will he disposed of so that the Defendant is legally entitled to it." Mr. Baron *Bramwell*

(1) 1 H. & C. 266. (2) 1 H. & C. 294. (3) 1 H. & C. 296, 297.

was of the same opinion, and said (1): "Mr. *Abdy* entered into an engagment with the directors of the *Customs Annuity and Benevolent Fund*, whereby, on certain payments being made by him during his life, he acquired a right to appoint a sum of money on his death, either for the benefit of his widow, if he had one, or, if not, of his relatives or nominees if accepted by the directors. In my opinion, that right was 'property,' and by his will he disposed of that property to his sister, the Defendant." Here there is an insurance of £1400 coming to Mr. *Maclean*, and he, by irrevocable deed, assigns it. The form of the assignment in this Court is unimportant; whether it is done by nomination, or by using the word "grant" or the word "assign," is utterly immaterial. He does assign it absolutely to trustees of the *Guardian Office*, who, by virtue of the rules, became entitled to receive the money. They are therefore the assignees of the policy. They are within the 17th section of the *Succession Duty Act*, and are not liable to pay duty. The claim of the Attorney-General therefore fails, and he can have no costs. The fund will be applied, in the first place, in payment of what is due to the Petitioners for principal, interest, and costs, including their costs of this Petition. I suppose the fund will be ample for that purpose; but, if it should not turn out to be sufficient, then the Respondents who made the claim will have to pay personally. If there is any surplus, it must be transferred to the suit for the administration of Mr. *Maclean's* estate; and of course that surplus will be liable to succession duty; but I am told that in fact the estate is insolvent.

Solicitors: Messrs. *Parkin & Pagden;* Mr. *J. Elliott Fox;* Messrs. *Beaumont & Son; The Solicitor of Inland Revenue.*

(1) 1 H. & C. 299.

M. R.

1875

Feb. 1.

FOX *v.* FOX.

[1874 F. 95.]

Will—Construction—Vesting—Gift to Children at Twenty-five—Gift of Intermediate Income for Maintenance—Discretionary Power—Remoteness.

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16CLD44
— 47

A testator directed his trustees to raise a sum of £15,000, and after the determination of certain prior life interests given to *T.* and his widow to divide and transfer one-fifth of the fund to and amongst the children of *T.* equally as and when they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof as the trustees for the time being might think fit, for his and her maintenance and education until such share should become payable as aforesaid; but if *T.* should leave no children him surviving, or if he should, and they should all die before attaining the age of twenty-one years, then to pay and transfer the said fifth part to the other persons therein referred to:—

Held, that the children of *T.* took vested interests, and consequently that the gift to them was not void for remoteness.

Pulsford v. *Hunter* (1) and *In re Ashmore's Trusts* (2) dissented from, and not followed.

Special case.

Thomas Were Fox the elder, by his will, dated the 9th of August, 1859, gave, devised, and bequeathed unto *William Fox*, *Mark Stephens Grigg*, *John Williams*, and *Thomas Were Fox*, the son, and *Henry Fox*, his real and personal estate not thereby specifically disposed of, subject to the pecuniary legacies and annuity thereby bequeathed, and to the payment of his debts, funeral and testamentary expenses, upon trust, in the first place, to raise thereout and set apart therefrom the sum of £15,000, and to invest the same sum in their names as therein mentioned, and to pay the income of the said sum of £15,000 so invested as aforesaid to his wife half-yearly during her life, and after her decease to pay the income of one equal fifth part of the said sum of £15,000 so invested as aforesaid to *Thomas Were Fox*, the son, half-yearly during his life, and after his decease to pay the said income thereof half-yearly to his widow, if he should leave a widow, during her widowhood; but if he should not leave a widow, or if he should,

(1) 3 Bro. C. C. 416. (2) Law Rep. 9 Eq. 99.

then, so soon as she should marry again or die, to divide and transfer the said equal one-fifth part of the said principal sum of £15,000 to and amongst the children of the said *Thomas Were Fox*, the son, equally as and when they should respectively attain the age of twenty-five years; but if he should have but one child, then to transfer the whole of the said one-fifth part to such only child, applying from time to time the income of the presumptive share of each child (if more than one), or the income of the whole if an only child, or so much thereof respectively as the trustees or trustee for the time being might think proper, to and for his and her maintenance and education until such share or entirety, as the case might be, should become payable as aforesaid; but if the said *Thomas Were Fox*, the son, should leave no children or child him surviving, or if he should and they should all die before attaining the age of twenty-five years, then to pay and transfer the said fifth part to the testator's son, the said *Henry Fox*, if then living, or if dead, to his children equally amongst them (if more than one) on attaining the age of twenty-five years respectively.

The testator died in February, 1860, and his widow in July, 1862.

Thomas Were Fox, the son, died on the 4th of July, 1870, leaving a widow and nine children, of whom the eldest was born on the 1st of May, 1854.

The widow of *Thomas Were Fox*, the son, married a second time in August, 1873.

The question was, whether the gift of one-fifth of the sum of £15,000 by the will of *Thomas Were Fox*, the elder, to the children of *Thomas Were Fox*, the son, was valid.

Mr. *Bagshawe*, Q.C., and Mr. *Ferrers*, for the Plaintiffs, the children of *Thomas Were Fox*, the son, contended that the gift was valid. They submitted that the direction for maintenance shewed that these children were intended to take vested interests, and that this construction was supported by the terms of the gift over.

Mr. *Chute*, for the Defendants, relied on *In re Ashmore's Trusts* (1).

(1) Law Rep. 9 Eq. 99.

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Mr. *Bagshawe*, in reply, cited *Harrison* v. *Grimwood* (1); *Davies* v. *Fisher* (2); *King* v. *Isaacson* (3).

Sir G. Jessel, M.R.:—

The first question is, whether a gift contained in a direction to pay to legatees on attaining a certain age, followed by a gift of the interest for maintenance, is vested?

In the case of *In re Ashmore's Trusts* (4) Lord Justice *James*, when Vice-Chancellor, held that a similar gift was not vested. He admitted that his first impression was the other way, but he decided as he did on the authority of an old case, *Pulsford* v. *Hunter* (5). I cannot help thinking there is some mistake in the report of *Pulsford* v. *Hunter*. The observations in the judgment, as reported, seem to me to point, not to a gift of the interest for maintenance, but to a gift of maintenance out of the interest, which is not in accordance with the terms of the will as given in the report. However that may be, it seems to me that the law is clearly laid down in subsequent authorities.

In *Watson* v. *Hayes* (6) Lord *Cottenham* says: "It is well known that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle that it is the gift of the whole interest which effects the vesting of the legacy. . . . It is therefore the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy."

If that be the law, it is very difficult to support the decision in *In re Ashmore's Trusts*. What the Vice-Chancellor said was this:— [His Honour read the judgment.]

I agree that *In re Ashmore's Trusts* is not to be distinguished

(1) 12 Beav. 192.
(2) 5 Ibid. 201.
(3) 17 Jur. 434; 22 L. J. (Ch.) 455.
(4) Law Rep. 9 Eq. 99.
(5) 3 Bro. C. C. 416.
(6) 5 My. & Cr. 125, 133.

from *Pulsford* v. *Hunter* (1) as regards the terms of the will, but I do not find that Lord *Loughborough* said that giving the whole of the income for maintenance was not equivalent to giving interest. The report says that "the Lord Chancellor thought that, however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to giving interest." These observations, if correctly reported (which I doubt), seem to me to point to the distinction taken by Lord *Cottenham* between a gift of interest to be applied in maintenance and a gift of maintenance apart from interest; but if this be not the true meaning of them, then I think they are overruled by what Lord *Cottenham* said and by the current of modern authorities. Indeed, I cannot think that *Watson* v. *Hayes* (2) and the subsequent cases were called to the Vice-Chancellor's attention; if they had, I feel sure he would willingly and cheerfully have followed them.

One of these cases is that of *Re Hart's Trusts* (3), before the Appeal Court. There the testator gave real estate to a devisee for life, with remainder to trustees in fee, in trust to sell and out of the proceeds to pay a legacy of £500 when the legatee should attain twenty-five, and he directed that the legacy should carry interest from the death of the tenant for life, to be paid towards the legatee's maintenance until she attained twenty-five. The legatee survived the tenant for life, but died under twenty-five; and it was held that the legacy was vested. Lord Justice *Knight Bruce* says that the legatee, "if the gift in question had been a legacy out of the testator's personal estate merely, would, in my opinion, upon principle equally and authority, have acquired a vested right to the £500 for her absolute use, either on the testator's death (subject to his mother's life estate) or on the death of his mother. For by the will interest was made payable on the £500 from the time of the death of the testator's mother, and that interest was directed to be applied wholly for the benefit of" the legatee. Lord Justice *Turner* adverts to the distinction taken by Lord *Cottenham* in *Watson* v. *Hayes*, and says: "In the present case the direction is, that the legacy shall carry interest, annexing, as it seems to me, the interest to the legacy; and I do not see

(1) 3 Bro. C. C. 416. (2) 5 My. & Cr. 125.
(3) 3 De G. & J. 195, 200, 202.

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how we could hold this legacy not to be vested, unless we were prepared to hold that no legacy to be paid when a legatee attains a prescribed age, with interest in the meantime, vests until the legatee has attained the specific age, a conclusion which would be quite at variance with *Hanson* v. *Graham* (1) and many other decided cases." Both the Lords Justices take the same view, which appears to me to be quite at variance with what was decided in *Pulsford* v. *Hunter* (2).

The Vice-Chancellor, in the case of *In re Ashmore's Trusts* (3), appears to have thrown out the suggestion that there might be a distinction between a gift of a separate share to each of the children on attaining twenty-one, with a gift of the income in the meantime for maintenance, and a gift of a fund to each of the children on attaining twenty-one in equal shares, with a gift of interest in the meantime. I can find no such distinction taken in any other case, and it seems to me to be much too fine to be relied on.

There still remains the difficulty that the gift here is not a gift of the whole income absolutely for maintenance: there is a discretionary power to apply the whole income, or so much as the trustees may think proper, and the question is, whether that is a gift of the whole interest within the rule as laid down in *Watson* v. *Hayes* (4) and the other cases I have referred to. On that point *Harrison* v. *Grimwood* (5) is a distinct authority. There the legacy was given to a class, followed by a direction, during the minority of the members of the class, to apply the interest, "or a competent portion thereof," for maintenance; and the Court held the legacy was vested. Lord *Langdale* does not appear to have considered the indication of intention derived from the direction to pay the whole income as affected by the words enabling the trustees to apply a competent portion for maintenance; he treated it as a gift of the whole income followed by a discretion to apply less than the whole income; and that appears to me to be a rational view.

Being opposed to the frittering away of general rules, and thinking that such rules, so long as they remain rules, ought to be followed, I hold that a gift contained in a direction to pay and

(1) 6 Ves. 239.
(2) 3 Bro. C. C. 416.
(3) Law Rep. 9 Eq. 99.
(4) 5 My. & Cr. 125.
(5) 12 Beav. 192.

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divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose.

I also think that the gift over, if not conclusive on the question, certainly aids the construction adopted by me.

The answer to the special case must be that the gift is valid.

Solicitors: Messrs *Prideaux & Son*, agents for Mr. *H. Prideaux, Plymouth.*

BUSH *v.* TROWBRIDGE WATERWORKS COMPANY.

M. R. 1875 Feb. 10.

[1874 B. 291.]

Riparian Owner—Diversion of part of Stream—Waterworks Clauses Act, 1847 (10 & 11 *Vict.* c. 17), s. 6—*Lands Clauses Consolidation Act*, 1845 (8 *Vict.* c. 18), ss. 18, 84, 85, 68.

The abstraction by a waterworks company of water from a stream for the purposes of the undertaking does not, under the 6th section of the *Waterworks Clauses Act*, 1847, entitle a riparian owner below to require the company to treat for the purchase of his portion of the stream, but only entitles such riparian owner to claim compensation under the 68th section of the *Lands Clauses Consolidation Act*, 1845, for the stream being injuriously affected.

1 CPD. 694 701 2 CPD. 104 106-7 112 115, 116-7

Affirmed by L.J. L.R. 10 Ch. 459

THE *Cutteridge* estate, near *Trowbridge*, stood limited to the Plaintiff, *Elinor Maria Bush*, for life, with remainder to *Frank Whitaker Bush* in fee. Part of the estate consisted of an ancient water meadow, which the Plaintiff and her predecessors in title, as riparian owners, had for upwards of thirty years irrigated with the water of a brook called the *Biss Brook*, the whole ordinary flow of the stream being required for that purpose.

By the *Trowbridge Waterworks Act*, 1873, which embodied the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), and the *Lands Clauses Consolidation Act*, 1845 (8 Vict. c. 18), the Defendants were incorporated and empowered to make and maintain certain waterworks, and to divert the water of the *Biss* springs, which formed the principal supply of the *Biss Brook*.

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On the 5th of March, 1874, the Defendants served notice to treat for part of the *Cutteridge* estate, through which they were empowered to lay their main pipe.

In reply to that notice, and to a letter subsequently written by the Defendants' secretary stating that the Defendants desired only to acquire the easement of laying their main pipe, the Plaintiff sent in a claim of compensation in respect of such easement, and signified her desire to have the same settled by arbitration.

The Defendants then had the easement valued, and having deposited the amount of the valuation in Court, with a bond as provided by sect. 85 of the *Lands Clauses Consolidation Act*, laid their main pipe, and began to take water from the *Biss Brook* at a point about two miles above the water meadow.

The Plaintiff thereupon filed her bill, alleging that the flow of water was materially diminished by the act of the Defendants, and praying that the Defendants might be restrained from taking the water until they should have given to her notice of their intention to take such water, and should have offered to treat for the purchase of the interest of the Plaintiff and remainderman therein, and until the compensation for such interest should have been settled.

The cause now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *G. C. Price*, for the Plaintiff:—

The Defendants are not at liberty to take the water until they shall have purchased the Plaintiff's interest therein. The 18th, 84th, and 85th sections of the *Lands Clauses Consolidation Act* forbid the promoters of an undertaking to enter on the land of any person without his consent, until they shall have given notice of their intention to take the land, and shall have offered to treat for the purchase, and until the compensation shall have been paid, or ascertained and secured; and the 6th section of the *Waterworks Clauses Act* makes these provisions applicable to streams, enacting that the undertakers shall make to the owners and occupiers of lands or streams taken or used for the purposes of the Act. or injuriously affected by the construction or maintenance of waterworks, full compensation for the value of the lands or streams so taken or used, and for all damage sustained by such owners

by reason of the exercise, as to such lands or streams, of the powers vested in the undertakers. It will be argued on behalf of the Defendants that the stream is only injuriously affected by what has taken place; but it has been decided that the diversion of a stream like this, flowing through private property, is a "taking and using" the stream, entitling the owner to have the value of the stream ascertained and secured before such diversion can be made: *Ferrand* v. *Corporation of Bradford* (1).

Mr. *Roxburgh*, Q.C., and Mr. *Whitaker*, for the Defendants, were not called on.

SIR G. JESSEL, M.R.:—

I am clearly of opinion, so far as I can give an opinion upon a section so worded, that the 6th section of the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), was never intended to entitle the owner or occupier of a stream to compel the company to purchase his interest in the stream, because the company, not diverting the stream at all, took some water away higher up, whereby the flow of water in the stream was diminished. The words of the section are these: "Where, by the special Act, the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof"—meaning, as it appears to me, the owners or occupiers of the portion of the stream with which the company are interfering—"they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act, and, if the waterworks be situated in *England* or *Ireland*, to the provisions and restrictions contained in the *Lands Clauses Consolidation Act*, 1845 and if the waterworks be situated in *Scotland*, the provisions and restrictions contained in the *Lands Clauses Consolidation* (*Scotland*) *Act*, 1845, and shall make to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation,"

(1) 21 Beav. 412.

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which is to be ascertained in the manner provided by the *Lands Clauses Consolidation Act*. The latter part of the clause merely gives to persons interested a title to compensation under the 68th section of the *Lands Clauses Consolidation Act*, if the lands or streams are injuriously affected. If the land or stream is actually taken, that comes under another clause of the Act altogether. If the Defendants are taking the land or stream they will be within "the provisions and restrictions contained in the *Lands Clauses Consolidation Act*;" and these restrictions are, that you shall not take any land without giving notice to treat, and when you do take it you must make compensation for the value of what you take.

If the Plaintiff were right, the result would be this, that every owner or occupier of any part of a stream out of which a sufficient number of buckets were taken higher up, so as to appreciably injure the stream below, would have the right of saying to the company, "Buy my stream, and pay me the value of it." For that is the effect of the *Lands Clauses Consolidation Act*. If you interfere with property, you must buy it all; you have no right to say you will buy a part only. If you take land at all for the purposes of the undertaking, you must take it as it is, and the amount you are to pay for it is the value of the land interfered with. If this is an interference with the land or stream in that sense of the riparian owner, the result would be, that every riparian owner along the whole course of the stream could compel the *Waterworks Company* to buy his portion of the stream. I do not so read the *Waterworks Clauses Act*. I think the sensible way of reading the Act is the way in which I have read it, and which, it appears to me, gives the meaning that the words fairly bear, that is, that persons in the position of the Plaintiff are persons whose interests are injuriously affected, and must proceed by notice to get compensation in accordance with the 68th section of the *Lands Clauses Consolidation Act*. I must therefore dismiss the bill with costs.

Solicitors for the Plaintiff: Messrs. *Warry, Robins, & Burges.*
Solicitors for the Defendants: Messrs. *Whitakers & Woolbert.*

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[1874 H. 289.]

Married Woman—Separate Use—Power to transfer Stock—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *ss.* 3, 7, 11—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 22.

The *Married Women's Property Act*, 1870, does not empower a married woman, entitled under sect. 7 to a sum of stock for her separate use, to transfer such stock without the concurrence of her husband, unless and until the stock has been placed, under sect. 3, in her name as a married woman entitled for her separate use.

5 Ch. D. 927
6 Ch. D. 748

A sum of consols was standing in the name of three persons, one of whom was a married woman who had been deserted by her husband, and was entitled beneficially to the stock under sect. 7 of the *Married Women's Property Act*, 1870. Those persons applied to the *Bank of England* to be permitted to transfer the stock without the concurrence of the husband of the married woman; and the bank having refused:—

Held, that the bank could not be compelled to permit such a transfer.

DEMURRER.

The bill was by *Thomas George Howard*, *William Henry Finney*, and *Rose Ellen Lenton*, wife of *William Lenton*, "suing as a *feme sole* by virtue of the provisions contained in the *Married Women's Property Act*, 1870," Plaintiffs, against the Governor and Company of the *Bank of England* as Defendants; and it contained allegations to the following effect:—

In 1863, the Plaintiffs, *Thomas George Howard* and *William Henry Finney*, invested the sum of £100 in the purchase of £107 12*s.* consols, which were transferred into and were standing in the joint names of the Plaintiffs.

The said sum of £100 represented a legacy of that amount, in which the Plaintiff *Rose Ellen Lenton*, then *Rose Ellen Arnold*, was interested, as one of the children of *Robert Arnold*, under the following bequest in the will of *Mary Hack*, widow, dated the 7th of January, 1863, and proved on the 27th of April following:—"I give and bequeath the sum of £100 to each of the children of *Robert Arnold*, to be paid to them on their attaining their respective ages of twenty-one years, with benefit of survivorship among them if either should die under that age leaving no child or children."

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In May, 1872, *Rose Ellen Arnold* intermarried with *William Lenton*, who soon afterwards deserted her. She attained twenty-one on the 24th of June, 1874; and shortly afterwards the Plaintiffs applied to the Defendants to permit the £107 12*s.* consols to be transferred by the Plaintiffs, without the concurrence of *William Lenton*, into the name of *Rose Ellen Lenton* alone, to the intent that the same might be made to stand in the Defendants' books in her name as a married woman entitled to her separate use under the 3rd section of the *Married Women's Property Act*, 1870. The Defendants, however, refused to permit the transfer to be made without the concurrence of *William Lenton*.

No settlement had been made affecting the fund.

The bill prayed that it might be declared that the Plaintiffs were entitled to transfer the £107 12*s.* consols without the concurrence of the husband of *Rose Ellen Lenton*, and that the Defendants might be ordered to permit such transfer to be made accordingly.

The Defendants demurred for want of equity.

Mr. *Kekewich*, for the demurrer:—

In the first place, the *Married Women's Property Act*, 1870, does not entitle a married woman, who has not obtained a protection order or a decree for judicial separation, to sue without making her husband a party; and, if necessary, I demur, *ore tenus*, for want of parties.

The main question, however, is whether the Plaintiffs are entitled to the relief they seek. Mrs. *Lenton* is, no doubt, entitled to this sum of consols for her separate use; but the *Married Women's Property Act*, 1870, does not enable a married woman to transfer stock unless such stock has been transferred into her name as a married woman entitled for her separate use under sect. 3 of the Act. This stock is not so standing in the name of Mrs. *Lenton*. By the *National Debt Act*, 1870, s. 22 (1), stock cannot be transferred

(1) 33 & 34 Vict. c. 71, s. 22: "In the offices of the respective Accountants General of the Banks of *England* and *Ireland* books shall continue to be kept wherein all transfers of stock shall be entered.

"Every such entry shall be conceived in proper words for the purpose of transfer, and shall be signed by the party making the transfer; or, if he is absent, by his attorney thereunto lawfully authorized by writing under his

into her name until a proper transfer has been duly executed by the Plaintiffs in whose names the stock now stands. One of these Plaintiffs is a married woman, and in order that such transfer may be duly executed, her husband must concur; or if his concurrence cannot be obtained, proceedings may be taken under the Trustee Acts, or by bill.

[He was stopped.]

Mr. *Tremlett*, for the Plaintiffs:—

The decision in this case must turn on sects. 7 and 11 of the *Married Women's Property Act*, 1870. I admit that sect. 3 does not apply.

By sect. 11 it is provided that "a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property . . . and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman." Wherever, therefore, there is property declared by the Act to be the separate property of a married woman, she is as regards that a *feme sole*.

Then by sect. 7 it is provided that "where any woman married after the passing of this Act" (the 9th of August, 1870,) "shall during her marriage become entitled . . . to any sum of money not exceeding £200 under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use." Mrs. *Lenton* was married after the passing of the Act; she has become entitled during her marriage (viz., on the 24th of June, 1874,) to a sum of £100 under the will; and by virtue of the Act that sum belongs to her for her separate use.

The effect of the Act is to throw one general protection order

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hand and seal, attested by two or more credible witnesses.

"The person to whom a transfer is so made may, if he thinks fit, underwrite his acceptance thereof.

"Except as otherwise provided by Act of Parliament, no other mode of transferring stock shall be good in law."

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over the property of married women thereby declared to belong to them for their separate use; and to confer on married women, with reference to such property, all the rights which they could previously have obtained only by means of a protection order under 20 & 21 Vict. c. 85. One of such rights is the right to sue as a *feme sole: Bathe* v. *Bank of England* (1). There is no practical difference between the language of this Act and that of 20 & 21 Vict. c. 85, s. 26. This view of the effect of the Act is supported by *Summers* v. *City Bank* (2). Indeed, upon any other view, the Act will be of little practical use.

If this contention be well founded, the Act has given this fund entirely to Mrs. *Lenton;* her husband has no interest in it whatever; he is not a trustee of it; and, consequently, the application under the Trustee Acts, suggested by the other side, would be useless. If the fund stood in the names of the first two Plaintiffs the transfer could easily be made; the only difficulty raised by the Defendants is caused by the circumstance that the fund stands in Mrs. *Lenton's* name also; that is a mere technicality which must give way before the provisions of the Act.

SIR G. JESSEL, M.R.:—

I must allow this demurrer. The question raised is one of very great importance to the *Bank of England*, which is, in a sense, trustee for the public as regards stock standing in its books; and it is most important to the bank to know to whom to transfer the stock. It appears to me that the Legislature intended to protect the bank from all inquiries as to the beneficial interest in the stock. The bank is to see in whose names the stock stands, and to allow those persons, or, if they are dead, their legal personal representatives, to transfer the stock. The bank is simply to look at the books, unless, of course, the legal title has devolved by reason of death or bankruptcy, in which case official records must be produced on which the bank will act. But if the argument of the present Plaintiffs is to prevail, a further duty would be cast upon the bank, namely, of inquiring into the equitable title to the sum of stock when it differs from the legal title, and allowing the person who is entitled in equity only, as distinguished from being entitled to the legal right to the *chose in action*, which the stock

(1) 4 K. & J. 564. (2) Law Rep. 9 C. P. 580.

is, to transfer it on the result of that inquiry. I need not say that would be throwing a very great burden on the bank, because if the result of their final investigations was such as to satisfy the bank authorities that the equitable owner was really entitled, and that result should turn out to be erroneous, I see nothing to protect or indemnify the bank, which would be liable at the suit of the real equitable owner, and would not be protected either by legislative interference, or by having the assent of the legal owners. That shews how important this is to the bank; but of course it is of importance also to married women. Mr. *Tremlett* says if a married woman has quarrelled with her husband, or if he lives apart from her, or has deserted her, and she cannot find him, it is of very little use allowing her to invest in stock if she cannot transfer it. I agree in that entirely. But then the Legislature has provided a remedy. It has enabled a married woman to ask to have stock belonging to her registered in her own name as being entitled to it for her separate use, and when that is done she has, beyond doubt, a legal right to transfer it. The 3rd section is the section enabling her to do this. That section requires the bank to provide a form for the purpose. The sum of stock must not be less than £20 in amount, and she is to apply that it "may be transferred to or made to stand in the books of the governor and company to whom such application is made, in the name or intended name of the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman." So that there can be no doubt she is entitled under that section to require the bank to transfer into her name separately.

A question, not necessary now to be decided, was suggested in argument, as to whether, under that section, she could require it to be placed not only in her own name but in the names of other persons as well; that is, to a joint account. I must say, without intending to decide a question which is not strictly before me, that the section does not appear to me to apply to any such case. The requisition is to be to put it in the name of the woman as a married woman entitled to her separate use. The section does not apply to trust property at all. It provides that, "on such sum being entered

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in the books, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman." That seems to me to point to the case of stock standing in her sole name.

Then it is said that under the 7th section this property became property to which the married woman was entitled to her separate use. I think there can be no doubt about that. But then the question arises, what are her rights under the 7th section? Nothing can be better established than the meaning of the words "separate use." It is a term restricted in its application and meaning to Courts of Equity, and it gives the married woman the right to property independent of her husband in these Courts alone. Therefore, if there had been nothing more in the Act, the result would have been that the married woman must have sued in respect of all the property which became hers exclusively of her husband by virtue of the Act, in Courts of Equity only. But the Legislature, to avoid that mischief, put in the 11th section, which I think is very fairly described by the marginal note, "Married women may maintain an action"—and it gives a power to a married woman to maintain her action in her own name—"for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property," and so forth; "and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever, for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof, for her own use, as if such wages," &c., "belonged to her as an unmarried woman." What is the meaning of that? She did not want the remedies in a Court of Equity, because the moment the property is declared to be for her separate use she has the remedies in equity. What are the remedies mentioned? They are obviously remedies in a Court of Law as distinguished from those in a Court of Equity, because the first part of the section enables her to maintain an action; but they are remedies merely for the protection of the property. I do not find any right to contract in respect of that property given by the Act, except the right to contract in equity, which she would have under the words "property settled to her separate use," a right not acknowledged in a Court of Law. I cannot help seeing the careful distinction drawn by the Act between the right to the

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property itself and the remedy given for the recovery or protection of the property. It seems to me the Act is carefully framed for the purpose of making that distinction. One must not forget, too, that this subject had been previously under the consideration of the Legislature in the *Divorce and Matrimonial Causes Act* (20 & 21 Vict. c. 85). Now the 25th and 26th sections of that Act deal with a judicial separation. The 25th section is this: "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all respects as a *feme sole*." It does not make the property hers for her separate use, but enables her to dispose of it "as a *feme sole*." Then the 26th section is this: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs, and injuries, and suing and being sued in any civil proceeding." Therefore she is made a *feme sole* to all intents and purposes, both at law and equity, so far as regards property, and so far as regards torts and injuries. Considering that that Act had passed before the one now under consideration, one cannot help seeing that there is some reason for the difference in the expressions. It does appear to me that the present Act gives no power to contract to a married woman which she did not possess before. It does make certain property, property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a Court of Equity, and it superadds to that certain remedies in a Court of Law which it is considered desirable to give to the married woman in respect of these small sums, but beyond that I think the Act makes no alteration in the position of the married woman.

The result is that she has no right whatever to transfer this stock, that the bill cannot be maintained, and the demurrer must be allowed.

Solicitors: Messrs. *Freshfields & Williams;* Messrs. *Donne & Co.*

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1874
Nov. 21;
Dec. 5.

In re HERCULES INSURANCE COMPANY.

BRUNTON'S CLAIM.

Bond—Debenture—Equities between Obligor and Obligee—Recognition of Assignee.

24 L.D. 88

An insurance company having power to issue bonds and other securities, issued to *S.* a bond conditioned to be void on payment to him, his executors, administrators, and assigns, of £250 on a future day. The bond was assigned, for value to *B.*, and notice of the assignment given at the office of the company and accepted, but the assignment was never registered. No inquiry was made as to the validity of the instrument before *B.* took the assignment. Before the bond fell due, the company went into liquidation:—

Held, on an application by *B.'s* executors to prove against the company, that the company had, by accepting notice of the assignment, precluded themselves from setting up against the assignee equities between them and the original obligor attaching to the instrument itself.

Athenæum Life Assurance Society v. *Pooley* (1) observed upon.

THIS was a summons in the winding-up of the *Hercules Insurance Company, Limited*, originally taken out on the 5th of November, 1869, by *Archibald John Brunton* (who was since dead), seeking to be admitted a creditor for £250 as the assignee for value of a bond issued by the company for that amount.

The summons was now brought on by *Brunton's* executors as a representative case, there being several other persons in the same position.

The *Hercules Insurance Company* commenced business in 1865, and in 1868, they were negotiating for an amalgamation, which afterwards took place, with the *International Insurance Company*. In these negotiations, one *John Sheridan* took, or was supposed to have taken, some part on behalf of the *Hercules Company*, and as compensation for his services the directors agreed to give him £8000, of which £2000 was to be in cash, and the remaining £6000 in bonds of the company. The cash was accordingly paid to him, and for the balance the company gave him twenty-four bonds for £250 each, which were in the following form:—

(1) 1 Giff. 102; 3 De G. & J. 294.

4 Jur. N.S. 376 5 L.J. 129

"*Hercules Insurance Company, Limited.*

"Stamp, "25, *Cornhill,* and 142, *Strand, London.*
"6/9.

"Debenture Bond, No. 38...£250.

"29/5/68.

"Know all men that we, the *Hercules Insurance Company, Limited,* are held and firmly bound unto the said *John Sheridan,* Esq., of 3, *Elm Court, Temple,* in the county of *Middlesex,* in the penal sum of five hundred pounds of lawful money current in *Great Britain,* to be paid to the said *John Sheridan,* his executors, administrators, and assigns, for which payment to be well and faithfully made we bind ourselves and our successors, and our real and personal estate, firmly by these presents. Dated this twenty-third day of May, 1868. The condition of the above written bond is such, that if the said *Hercules Insurance Company, Limited,* shall pay to the said *John Sheridan,* his executors, administrators, and assigns, on the 15th day of November, which will be in the year of Our Lord, 1869, the sum of two hundred and fifty pounds, then the above obligation shall be void, otherwise shall remain in full force and virtue. Provided always that the above-written obligation is granted by the said *Hercules Company, Limited,* to the intent that the said sum may be charged upon and issue and payable out of the property for the time being of the said company, whatsoever the same may be, and wherever it may be situated, including the capital of the said company for the time being uncalled up. Given under the common seal of the company this twenty-third day of May, 1868.

"The common seal of the *Hercules Insurance Company, Limited,* was affixed hereby this 3rd day of May, 1868, in the presence of

"*H. M. Jones,*
"*John Werrett,* } Directors.
"*Sam. Jno. Shrubb,* Secretary."

These bonds were registered by the company.

The affidavit in support of the application stated that in the year 1866 *Samuel John Shrubb,* who was the secretary of the *Hercules Company,* and had almost the entire management in his

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hands, was indebted to *Brunton* in the sum of £714 4*s.* 6*d.*, for money paid to his use, and interest thereon, and on the 9th of January, 1867, *Brunton* commenced an action against him to recover this amount. In the February following, an arrangement was come to by which the debt was agreed to be taken at £684 7*s.* 6*d.*, to be repaid by instalments of £25, to be secured by *Shrubb's* promissory note, and a deposit of 200 £10 shares in the *Hercules Company*, on which £2 per share had been paid.

The promissory note was given accordingly, and two instalments of £25 were paid, after which *Shrubb* ceased to make any further payments, and on the 2nd of July, 1868, being threatened with an action by *Brunton* for the balance unless he gave security, offered to deposit and assign one of the bonds of the *Hercules Company* for £250 issued to *Sheridan* as security for £200, if *Brunton* would give him time to pay the instalments due and to become due till the 15th of November, 1869, when the bond would become payable. By an indenture dated the 7th of December, 1868, the bond was assigned to *Brunton.*

It was not shewn that any inquiry was made by or on behalf of *Brunton* before the execution of the assignment as to the validity of the bond; but afterwards, on the 12th of December, 1868, *Brunton's* solicitor called at the company's office and gave notice of the assignment, and *Shrubb,* as the officer of the company, stamped a duplicate of the notice with the company's stamp.

The assignment was never registered in the books of the company, and the company shortly afterwards, and before the bond fell due, stopped payment, and was shortly afterwards ordered to be wound up.

Brunton's claim was disallowed in Chambers, and it was only when, during the year 1874, a notice was issued by the liquidator to the whole of the creditors, requiring them to prove their claims preparatory to a final winding-up, that this claim, and that of other holders of the bonds issued to *Sheridan,* was brought into Court.

The following were the articles of association which conferred borrowing powers upon the company:—

"85. The directors may from time to time borrow, receive, and take up, by way of loan, advance, or deposit, for such period or periods, at such rate of interest, and either upon simple contract

or on any of the securities herein mentioned, or partly on simple contract and partly on any such security or securities, and generally upon such terms and conditions as the directors may think fit, such sum or sums of money as they may deem expedient, and that notwithstanding a part only, and not the whole, of the nominal capital of the company shall have been allotted, accepted, or taken up: provided nevertheless that the company shall never borrow, owe, take up, or receive on deposit at any one time a sum exceeding £100,000.

"86. The directors are expressly empowered from time to time to grant, enter into, and execute under the common seal of the company any mortgage or mortgages of the property, real or personal, for the time being belonging to the company, or of any part or parts of such property, and also to grant, enter into, execute, and issue under such seal any bond or bonds, debenture or debentures, or any security they may think fit, and as may be agreed upon between them and the person making any such loan or advance to or deposit with the company as aforesaid for securing the repayment by the company of such loan, advance, or deposit, together with interest thereon. Any such mortgage bond, debenture, or other security shall be in such form and shall contain all such covenants, provisions, and agreements on the part of the company as the directors may deem right and proper.

"87. Any mortgage bond, debenture, or other security, or acknowledgment bearing the common seal of the company and attested by two of the directors for the time being, and issued for valuable consideration, or any security so issued and signed as the directors may appoint, shall be binding and obligatory upon the company, notwithstanding any irregularity touching the authority of the directors to issue the same.

"88. The directors may from time to time make, issue, and indorse, under the common seal of the company, policies of assurance and insurance, annuities, endowments, bonds, and all other instruments relating to the ordinary business of the company."

Mr. *Higgins*, Q.C., and Mr. *Horton Smith*, in support of the application:—

The bond in this case was one of a series given originally for

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valuable consideration, namely, the services rendered by *Sheridan* in carrying out the amalgamation with the *International Insurance Company*. But, whatever were the relations between *Sheridan* and the company, *Brunton* was an assignee for value of a security issued by the directors of the company in pursuance of the powers conferred upon them by the articles of association, and having no notice of any equities between *Sheridan* and the company, he is entitled to the benefit of his security. If any inquiries were necessary as to the validity of the security, what was done was amply sufficient to stop the company from setting up their equities. The acceptance by the company of the notice of the assignment was a waiver of any such claim.

But the nature of the security was such as to give an assignee for value a title clear of all equities. The point attempted to be raised here is very like that in *Ex parte Colborne and Strawbridge* (1). It seems to be suggested that the debentures were issued fraudulently or without consideration; but this defence cannot be set up against an innocent holder for value: *Webb* v. *Commissioners of Herne Bay* (2).

[The VICE-CHANCELLOR:—This is very like *Athenæum Life Assurance Society* v. *Pooley* (3), which I think I have expressed my opinion cannot be sustained as an authority.]

That was in *Ex parte Chorley* (4).

The company having accepted the assignment, are estopped from saying that the issue of debentures was *ultrà vires*. This has been decided in the Common Law Courts in *Webb* v. *Commissioners of Herne Bay*; *Pickard* v. *Sears* (5); *Higgs* v. *Northern Assam Tea Company* (6); and in Equity in *In re Northern Assam Tea Company* (7); *In re Natal Investment Company* (8); and in *Ex parte Colborne and Strawbridge*.

[The VICE-CHANCELLOR:—I think I went so far on one occasion as to say that a company could not set off equities against a bond given to *A. B.*, his executors, administrators, and assigns.]

(1) Law Rep. 11 Eq. 478.
(2) Ibid. 5 Q. B. 642.
(3) 1 Giff. 102; 3 De G. & J. 294.
(4) Law Rep. 11 Eq. 157.
(5) 6 A. & E. 469.
(6) Law Rep. 4 Ex. 387.
(7) Ibid. 10 Eq. 458.
(8) Ibid. 3 Ch. 355.

(3 Sc. 4 Jur. N.S. 374 5 Lib. 129.

That was in *Ex parte Chorley* (1), and also in *Carey's Claim* (before Vice-Chancellor *Malins*, Jan. 18, 1873), which was a subsequent application of the same kind in the same company.

Mr. *Cotton*, Q.C., and Mr. *E. S. Ford*, for the *Hercules Insurance Company*:—

It is a clear principle of law, that any one taking a *chose in action* not assignable at law takes it subject to any equities existing between the parties by whom it was originally issued. The case of the company in this instance is that the bond was part of a larger sum issued under circumstances of gross fraud, by which the directors bound themselves to pay *Sheridan* the funds which they held out to their shareholders were to be received for their own benefit.

There are two questions to be considered: First, whether *Sheridan* could recover on this bond; and, secondly, whether *Brunton* stood in any better position than *Sheridan*.

If the directors were acting *ultrà vires*, no subsequent actions on their part can set up their void acts and make them valid. There is a clear distinction to be kept in mind between an equity attaching to an instrument such as a bond, and a claim by way of set-off: *Ex parte Swan* (2). This is a case of an equity attaching to the note itself, and *Athenæum Life Assurance Society* v. *Pooley* (3) is exactly in point, and shews that the assignee takes only subject to equities. *In re Natal Investment Company* (4) applies the same principle to a document similar to this bond. The difference between that case and *Ex parte City Bank* (5) is founded on the distinction between an equity attaching to the instrument itself and a right of set-off. A right of the same kind was attempted to be set up in *In re Agra and Masterman's Bank* (6).

The cases cited in support of the summons are of two classes: first, those in which the company was specially authorized to issue transferable securities, as in *Webb* v. *Commissioners of Herne*

(1) Law Rep. 11 Eq. 157.
(2) Ibid. 6 Eq. 344.
(3) 1 Giff. 102; 3 De G. & J. 294.
(4) Law Rep. 3 Ch. 355.
(5) Ibid. 758.
(6) Ibid. 2 Ch. 391.

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Bay (1); and, secondly, those in which, as in *Higgs* v. *Northern Assam Tea Company* (2), the form of the bond made it negotiable. The latter case was, moreover, one of set-off, not of equities attaching to the bills originally; and that distinction is made apparent from *In re Northern Assam Tea Company* (3). After the company had recognised the transferee, a debt became due from the original holder, and that debt the company sought to set off against the claim of the transferee. *Ex parte Colborne and Strawbridge* (4) was decided on the ground that the instruments were really promissory notes, and as such, though under seal, were transferable. *Aslatt* v. *Farquharson* (5) was also a case of set-off. In *Chorley's Case* the applicant had obtained judgment against the company, and though some remarks in the judgment reflected upon *Athenæum Life Assurance Society* v. *Pooley* (6), the actual decision was based upon the fact of judgment having been obtained. *Athenæum Life Assurance Society* v. *Pooley* was a decision that if a person who cannot sue at law comes into equity he must sue subject to rights of set-off and other equities attaching to the original holder of the security. Another case, something like it, was *Woodhams* v. *Anglo-Australian and Universal Family Life Assurance Company* (7). It is always treated as a binding authority.

Mr. *Higgins*, in reply:—

In re Natal Investment Company (8) is not an authority for the proposition for which it was cited. It does not appear that the company in that case had any authority to issue debentures, or that the *Financial Corporation* ever went to the office of the company to inquire as to the validity of the securities. The shareholders here are in the position of having stood by and allowed innocent assignees of securities given by the company to deal with them, and having done so, they are not entitled to set up equities against them. As regards *Athenæum Life Assurance Society* v. *Pooley*, there is no such case of fraud made out here as in that case.

(1) Law Rep. 5 Q. B. 642.
(2) Ibid. 4 Ex. 387.
(3) Ibid. 10 Eq. 458.
(4) Ibid. 11 Eq. 478.
(5) 10 W. R. 458.
(6) 1 Giff. 102; 3 De G. & J. 294.
(7) 2 D. J. & S. 162.
(8) Law Rep. 3 Ch. 355.

SIR R. MALINS, V.C.:—

In 1868 the *Hercules Insurance Company* were negotiating an amalgamation with the *International Insurance Company*, which is also being wound up before me. It was thought very expedient for the *Hercules Company* to acquire that business, and it was thought necessary in order to do so that Mr. *Sheridan*, whose name has been so much mentioned, should be employed in bringing about the amalgamation, and as a remuneration for his services the *Hercules Company* agreed to pay him £8000, of which £2000 was paid in cash, and the remaining £6000 was secured to him by bonds, which were accordingly issued. [His Honour then read the bonds in question, and continued:—]

In the course of the autumn of that year, Mr. *Brunton*, to whom Mr. *Shrubb*, the secretary of the company, was indebted, sued him, and obtained judgment against him, and he was liable to be taken in execution, a matter of great moment to Mr. *Shrubb*, who was, in point of fact, pretty nearly the whole company himself.

He was unable to pay Mr. *Brunton*, but he offered him as security for part of the debt one of these bonds, which was accordingly deposited with Mr. *Brunton* on the 27th of August, 1868. That was a deposit only, probably in the expectation that Mr. *Brunton* would soon be paid. But he was not paid, and a formal assignment of the bond was executed by *Sheridan*, at the request of *Shrubb*, to *Brunton*, on the 7th of December, 1868. Now, I have had no evidence before me to shew that before the assignment of this bond was taken, Mr. *Brunton* made any inquiry by himself or his agents at the *Hercules* office. But this, I think, I am at liberty to infer, and I do infer, that had such an inquiry been made at the office, whether from Mr. *Shrubb* himself, or the chairman of the company, or any of the directors, or the collective body of directors, the answer would have been that the bond was good and would be paid at maturity. But five days after the assignment was executed, namely, on the 12th of December, this bond was taken to the office and notice of the assignment was given, and upon that being done it was the duty of the officers of the company to register the fact of assignment, and I think that persons dealing with a company are entitled to assume that the officers will do their duty; and if, as was said, there was no registration, it shews there was

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great neglect on the part of the directors and of all concerned: and for that neglect the company, and not persons dealing with it, must be answerable. The bond then was, or ought to have been, registered; but, at all events, notice of the assignment was accepted. The company was, no doubt, at that time in a very rickety condition, and in the course of the winding-up it has turned out to be an insolvent and even fraudulent concern; but Mr. *Brunton* is not affected with notice of this state of things.

The argument on the part of the company is, that they are under no obligation to pay this bond, because it was originally issued fraudulently and without consideration. I may say, in the first place, I am not at all satisfied that it was issued fraudulently. It was within the power of the directors to amalgamate with and purchase this other company, and, as incidental to that, to provide proper remuneration to the persons engaged in the amalgamation. I think it very probable that, if Mr. *Sheridan* were the claimant on this bond, he would not succeed before me; but it is not like the case of *Athenæum Life Assurance Society* v. *Pooley* (1), where bonds were issued by means of the grossest and most abominable conspiracy and fraud on the part of the managing director. There was nothing of the kind here; but there might be no consideration to support the bond as between the company and Mr. *Sheridan*, and he might not succeed in enforcing it. This company was not merely an insurance company, but had in addition extensive powers of borrowing money. [His Honour then read the clauses 85, 86, 87, and 88 of the articles of association, and continued:—] They say to the public at large, "Whatever bonds are issued by our directors shall be deemed to be our bonds and binding upon us accordingly." It may well be conceded as the ordinary rule of this Court, and one certainly founded on sound common sense and principle, that an assignee of a *chose in action*, such as a bond, taking it without inquiry takes it subject to all the equities and perils attaching to it. If a person before taking an assignment of a bond actually inquires from the obligor whether it is a good bond, and the money secured by it is due, and is told that the bond is good and the money is due, the obligor can never set up against the assignee that the bond was obtained by fraud. I do not insinuate the

(1) 1 Giff. 102; 3 De G. & J. 294.

slightest opinion as to how the case would have stood if part of the bond had been paid off, although there would have been gross negligence on the part of the company not to have indorsed that fact upon the bond; but it may be assumed that though if a person who takes a bond without asking the debtor whether the money is due, takes it subject to the equities between the parties, yet, if the bond is presented to him bearing upon the face of it the fact that it has not yet fallen due, and he is told, on inquiring from the debtor, that the money is due, and it turns out nevertheless that it has been paid by anticipation, he ought to be protected against a claim to set up that the money was not due. It has been said, on the one hand, and this is what was relied upon by the official liquidator, that issuing the bond without consideration was *ultrà vires*. I can only repeat the observation I made in *Ex parte Colborne and Strawbridge* (1), that in all these cases of public companies desirous of borrowing either upon promissory notes or debentures, if a broad view of the matter is taken, their real interest is not to have their bonds and notes discredited, but that every facility should be given to sell them in the market, and that those who hold them should have instruments which, although not negotiable are readily saleable; but if it were to be supposed that when bonds are executed in pursuance of the powers vested in the directors, every person dealing in them is to inquire whether they were issued for a valuable consideration, or whether the issue was *ultrà vires*, or to make any inquiry except whether the money is due, the result would be most prejudicial to the interest of companies in general.

Therefore, upon principle, I come to the conclusion that this bond, though not assignable at law, so that the assignee could sue in his own name, is assignable in equity, so that the assignee would have to sue at law in the name of the original obligee, and that when the company say that the money is due, they waive the right, if any, which might exist in equity between the parties. Whatever equity existed if no inquiry had been made, had been waived by conduct which is equivalent to ensuring payment, that is, by registering the bond as a valid and subsisting bond. Upon principle, I am of opinion that what Mr. *Brunton* did is abundantly

(1) Law Rep. 11 Eq. 478.

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sufficient to make him the owner of this bond in equity, and to give him the same right against the company as if he held a negotiable security.

Then, in opposition to this, many cases were pressed upon me in argument, besides the case of *Athenæum Life Assurance Society* v. *Pooley* (1), but I do not think there is any other authority which supports the argument of the official liquidator. I have a very strong opinion, as I have already, perhaps rather boldly, said, that the *Athenæum Life Assurance Society* v. *Pooley* ought not to have been decided as it was. It was the case of a life assurance company, of precisely the same nature as this, issuing bonds, which they had power to issue, and a Mr. *Laurie*, desiring to invest £3000 or £4000, asked his broker what would be a good security, and the broker recommended the bonds of the *Athenæum Life Assurance Society* as paying 5 per cent. and being to be bought at 90. Mr. *Laurie* accordingly invested between £3000 and £4000 in the bonds of the company. Before he paid his money he made inquiries at the office as to whether the bonds were good, and was told they were. When he bought, he gave notice of the assignment to the office, and it was duly registered. That was followed by the payment of two and a half years' interest upon the bonds, and then the company was wound up, and the defence was set up that the bonds were invalid because they were issued fraudulently, as most undoubtedly they were. I am afraid that that circumstance so impressed itself upon the minds of the learned Judges, Vice-Chancellor *Stuart* first, and Lords Justices *Knight Bruce* and *Turner* afterwards, that they never got over the impression of the fraudulent circumstances under which the bonds were issued. With every possible reverence for the two learned Judges who have left us, and with the greatest respect for Vice-Chancellor *Stuart*, an able and experienced Judge, before whom I had the honour of practising for so many years, I do not think that the decision in that case can at this day stand as good law. It has never been formally overruled, but I think that all the cases which have been cited to-day are in opposition to it, except perhaps the decision of Lord *Cairns* in *In re Natal Investment Company* (2), which may be said to be, I think, to a certain extent

(1) 1 Giff. 102; 3 De G. & J. 294. (2) Law Rep. 3 Ch. 355.

decided in accordance with *Athenæum Life Assurance Society* v. *Pooley* (1).

I had occasion in *Ex parte Colborne and Strawbridge* (2) to point out that by a subsequent decision of Lords Justices *Wood* and *Selwyn* in *Ex parte City Bank* (3), where the case was cited and commented upon, they had decided in a manner entirely opposed to it. I was then, and am still, unable to reconcile the two decisions, and I now repeat that I am bound to consider the second as the ruling authority. [His Honour then read the head-note in *Ex parte City Bank*, and continued:—] I think that case completely bears out what I have said. Although it was a case of a negotiable instrument, yet it was within the power of the company, and the bank having taken it in that form precluded themselves from setting up the equities which existed between them and the person to whom the instrument was originally issued.

Then there was the case of *Webb* v. *Herne Bay Commissioners* (4), which Mr. *Cotton* says depended upon the fact that the instrument was assignable at law. It is true that it was in that case so assignable, but I think Mr. *Higgins*' observation is well founded, that the Court of Queen's Bench did not proceed upon that ground, but upon this, that though the company had issued the debenture for an illegal consideration, and to a person to whom they had no right to issue it, yet, by having issued it in the form of a money bond, and having represented to the holder that it was a valid bond, they had precluded themselves from setting up the equity which they otherwise might have done. And, therefore, that is a decision which warrants me in coming to the conclusion that, whatever equities the company might set up against Mr. *Sheridan*, their conduct has precluded them from setting them up against his assignee, and that is also in consonance with what I am now about to decide.

The same equitable principle was also dealt with by a Common Law Court in *Higgs* v. *Northern Assam Tea Company* (5). It was a case in which the Plaintiff, having sold an estate to the Defendant company, received from them, in part payment of the purchase-

(1) 1 Giff. 102; 3 De G. & J. 294.
(2) Law Rep. 11 Eq. 478.
(3) Law Rep. 3 Ch. 738.
(4) Ibid. 5 Q. B. 642.
(5) Law Rep. 4 Ex. 387.

(0 S C 4 Jur N S 371, 5 id 129

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money, a large number of debentures for £100 each, expressed to be payable to him or his assigns. Some of these debentures he afterwards assigned to Messrs. *Cavendish & Smith*. The transfers to the assignees were duly registered. When the debentures came to be dealt with, the company endeavoured to set up equities against the assignees; and Mr. *Mellish*, who argued the case for the company, contended that the Defendants had not, either by the form of the debenture bonds or by their dealing with the assignees, lost the right to take advantage of the ordinary rule that the assignee of the *chose in action* takes it subject to all the equities existing between the original parties to the contract, and for that proposition he cited several cases. Mr. Baron *Bramwell*, in dealing with the cases, said: (1) "The question in them is the same as would arise if Messrs. *Cavendish & Smith* had brought suits in their own names in equity against the Defendants, and the Defendants had set up the defence they now set up of a legal set-off. Would there be what is called an equity to prevent their doing so —that is, taking the set-off to be available at law, would equity restrain the Defendants from relying on it? This is obviously a purely equitable question, and our answer must be given with great distrust, the more so owing to the state of the authorities. This set-off is a set-off in law. Have the Defendants so contracted, or conducted themselves, that they cannot avail themselves of it? The equity, if any, of Messrs. *Cavendish & Smith* to restrain the set-off is an equity between them and the Defendants. For we presume that if it should appear these debentures were to be paid to assignees of them without the right of set-off—still, if *Higgs* himself sued, a set-off would be available against him." Then he and the rest of the Court concurred in considering that the company had so conducted themselves by admitting the assignment as to preclude themselves from setting up equities which they might have set up against the man *Higgs*, but which they could not set up against the assignee from him. The case of the same company also came before Lord *Romilly* in *In re Northern Assam Tea Company* (2), and he entirely adopted the opinion of the Court of Exchequer, and decided that the assignees had a perfectly valid title.

(1) Law Rep. 4 Ex. 394. (2) Law Rep. 10 Eq. 458.

I only refer to *Ex parte Chorley* (1) because it has been acquiesced in and acted upon. It was the case of an assignment of a bond of the *South Essex Estuary Company*, which no doubt was different to this extent, that not only had the bond been acknowledged by the company, and interest paid upon it, but a judgment had been obtained upon the bond itself, and I held that the judgment was conclusive; but I am bound to say that the registration of the bond would have been sufficient, in my opinion, and so I should have decided.

There was another case in the same company—*Carey's Claim*—where there had been no action, but simply an equity. There I held that the conduct of the company precluded them from setting up the equity which they might have as against the original obligee of the bond, who was one of their own body, I think.

There was a case of *Woodhams* v. *Anglo-Australian and Universal Family Life Assurance Company* (2):—[His Honour then read the marginal note in that case, and continued:—] That seems to go the whole length. I argued the case myself, and the decision is in accordance with what I am now deciding.

Therefore I think that, except *Athenæum Life Assurance Society* v. *Pooley* (3), the authorities are all in accordance with what I now decide, that whatever equities a company may have against the original obligee on a bond issued by them, they may, either by direct admission or by conduct, preclude themselves from setting them up against an assignee for valuable consideration.

I might mention that I have carefully looked over my judgment in *Ex parte Colborne and Strawbridge* (4), and I adhere to everything I said in that case.

Upon all these grounds I come to the conclusion that the company have, by their conduct, precluded themselves from setting up against Mr. *Brunton* any equity which they might have had against Mr. *Sheridan* himself. Mr. *Brunton's* executors must therefore stand as creditors for the amount of the bond, with interest till the date of the winding-up.

Solicitors: Mr. *H. M. Phillips*; Messrs. *Merriman, Powell, & Co.*

(1) Law Rep. 11 Eq. 157.
(2) 2 D. J. & S. 162.
(3) 1 Giff. 102; 3 De G. & J. 294.
(4) Law Rep. 11 Eq. 478.

V.-C. M.

1874

Dec. 11.

WHEELER *v.* GILL.

Administration—Creditor's Suit—Interest on Debts—Coming in under the Decree—General Order, 1841, r. 44.

The General Order of 1841, allowing interest on the debts of creditors who come in and establish their debts under a decree in a suit, does not apply to a creditor who, though Plaintiff in a suit in which a decree was taken before the date of the General Order, did not technically come in under the decree till afterwards.

THIS was an old suit, commenced before the year 1830, by a bill in which *Robert Wheeler* the elder, *Robert Wheeler* the younger (trading as *Robert Wheeler & Sons*), and *Henry New*, on behalf of themselves and all other creditors of *John Gill*, deceased, and *John Avery Gill*, *Mary Ann Gill*, *Harry Gill* the younger, and *Emma Gill*, an infant, as persons beneficially interested in the estate after payment of debts, were Plaintiffs, and *Harry Gill* and others were Defendants.

The suit was an ordinary one for administration by persons claiming as creditors and as next of kin of an intestate.

An ordinary administration decree was taken on the 11th of February, 1830, on an affidavit by the creditor Plaintiffs claiming £600 as due to them.

The costs of the suit were taxed and paid out of the estate, and there remained a balance of £440, which was paid into Court and invested, and was now represented by a sum of £478 8*s.* 8*d.* consols.

No further step was taken in the suit. The creditors did not come in formally under the decree and establish their debts, and the interest on the fund in Court was accumulated, and the total fund was now represented by £1068 5*s.* 3*d.* consols.

The present Petition was presented in the year 1873 by the survivor of the creditor Plaintiffs, asking for payment to him of the accumulated fund. An order was taken referring it to Chambers, and the Petitioner then came in and proved his debt by the same evidence on which the decree had been taken. The Chief Clerk by his certificate, dated the 10th of July, 1874, found that £480

was due for principal money to the Petitioner, and that no interest was payable in respect of such principal sum unless the Petitioner became entitled to such interest by virtue of the General Orders of the Court.

Before the General Orders of the 26th of August, 1841, no interest was allowed to creditors on their debts, but by the Gen. Ord. XLVI. of that date (1), which is almost identical with the Cons. Ord. XXII. R. X. 10, now in force, interest was allowed to creditors who came in under a decree and established their debts after the date of the Order.

The question now raised was, whether the Petitioner as representing the creditors, or the Respondents as representing the next of kin of the intestate in the cause, were entitled to so much of the fund in Court as represented interest.

Mr. *Glasse*, Q.C., and Mr. *C. H. Turner*, for the Petitioner:—

To obtain the benefit of the Order of 1841 it is only necessary to come in and prove the debt after the date of the Order. The date of the filing of the bill or the decree is immaterial: *Spencer* v. *Butler* (2); *Gruggen* v. *Cochrane* (3). Every creditor in an administration suit, whether Plaintiff or not, must come in under a decree and establish his debt: *Trail* v. *Kibblewhite* (4). If those cases left the matter doubtful, it is settled by a case of *Hawkins* v. *Hillman*, which came before the Master of the Rolls on the 24th of November, 1860, and where the point was actually decided. There is no doubt as to the meaning of coming in under a decree: *Cardell* v *Hawke* (5). A creditor, though he makes an affidavit for the purpose of obtaining a decree, must come in afterwards and prove his debt in Chambers: *Owens* v. *Dickenson* (6). The fund belongs to the creditors, and they have at least a moral claim to all accretions.

(1) The order of the 26th of August, 1841, was as follows:—

"A creditor whose debt does not carry interest, who shall come in and establish the same before the Master under a decree or order in a suit, shall be entitled to interest on his debt at the rate of £4 per cent., from the date of the decree, out of any amounts which may remain after satisfying the costs of the suit, the debts established and the interest of such debts as by law carry interest."

(2) 5 Jur. 1130.

(3) 13 W. R. 520; 5 N. R. 457.

(4) 11 L. J. (Ch.) 248.

(5) Law Rep. 6 Eq. 464.

(6) Cr. & Ph. 48.

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Mr. *G. Murray*, as *amicus curiæ*, stated that he was one of the counsel in *Hawkins* v. *Hillman*, and that there was no argument, and the decree was in fact taken by consent.

Mr. *Higgins*, Q.C., and Mr. *Romer*, for the representatives of the next of kin:—

Except for the case of *Hawkins* v. *Hillman*, the question is completely covered by authority. To obtain the benefit of the order, parties must come in and establish their debts for the first time after the date of the order, and a Plaintiff who has proved his debt by affidavit for the purpose of obtaining a decree must be considered to have come in at the time of doing so: *Spencer* v. *Butler* (1) is a clear authority for this proposition, and it was expressly followed on that point in *Gruggen* v. *Cochrane* (2). In *Hawkins* v. *Hillman* there was no argument, and the order was taken by consent; and it is obvious that there were no persons before the Court interested in taking the opposite view.

Mr. *Glasse*, in reply:—

A creditor does not, by obtaining a decree, establish his right to be put on the list of creditors. He must still come in and prove his debt, like all other persons: *Owens* v. *Dickenson* (3); and all creditors coming in under a decree are within the strict meaning of the order.

SIR R. MALINS, V.C.:—

In and previously to the year 1830, in a creditor's suit for administration no creditor could ever have interest on his debt, whatever the amount of the assets to be administered. That was an injustice, and therefore the General Order of 1841 was made allowing interest to creditors who came in and established their debts under a decree or order in a suit. Now, the question is whether that means to include all decrees whenever made, or only those subsequent in date to the General Order.

In the present case the creditor Plaintiffs ought to have established their debts between the years 1830 and 1841, and it could

(1) 5 Jur. 1130. (2) 13 W. R. 520; 5 N. R. 457.
(3) Cr. & Ph. 43.

only be by a gross neglect of duty that they could have been prevented from doing so within that period. If that had been done, they would not have been entitled to any interest on their debt. Are they then, by delaying all those years, to have the benefit of a rule which would not have applied to their case if they had prosecuted their claim with due diligence?

Mr. *Glasse* says that if the creditors had come in and proved immediately after the decree they would have exhausted the fund, and that, consequently, the fund with all its accretions is their fund, and ought to be paid out to them. But I cannot consider that a creditor who delays for forty-three years to prove his claim has any merits as against the next of kin of the debtor.

If I had my way, neither party would obtain the portion of the fund representing interest, but it would be handed over to the Commissioners for the Reduction of the National Debt. But this is not the law, and one or other of the present claimants must take the fund. If I decide in favour of the next of kin, I shall follow all the authorities except *Hawkins* v. *Hillman*. If that were a considered judgment, I should be bound to decide the present case in favour of the Petitioner. But although it was heard fourteen years ago, Mr. *Murray* recollects that there was no argument, and I think it is clear that if there had been any argument there would have been some note of the fact. It is, therefore, a case in which the order was taken by consent, and there was no adjudication; and having now heard the arguments, I think it is clear that the cases cited are in point. I consider that they decide that if one of the operations which are required to perfect the title of the creditor has taken place before the date of the order, it does not apply, because in order to bring the creditor within the rule he must come in and prove his debt after the date of the order.

I cannot consider that a Plaintiff who comes in for the purpose of proving his debt upon evidence, every particle of which was in existence years before the date of the order, can be considered as coming in and establishing his debt after the date of the order. I must, therefore, come to the conclusion that a creditor who

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obtains a decree goes in for the purpose of proving his debt at the time, though it may be that, technically, he must go in under the decree, and afterwards prove his debt in Chambers.

The creditors must, therefore, receive the principal of their debt out of the fund in Court, and the costs of all parties will also be paid out of the fund, and the residue will be paid to the Respondents.

Solicitors: Mr. *Berry;* Messrs. *J. C. Button & Co.*

V.-C. M. 1875 Jan. 22.

In re PALMER'S SETTLEMENT TRUSTS.

Construction of Settlement—"Survivor" to be read "other."

The word "survivor" in one of the clauses of a settlement may be read "other" in order to effectuate the clear intention of the parties, notwithstanding that the same word may require to be read in its natural sense in other clauses of the same settlement referring to the same fund.

BY a deed of settlement, dated the 12th of June, 1824, *Elizabeth Palmer* and *Susanna Palmer* assigned to trustees certain stocks, funds, and securities, and personal estate and effects, vested in them by virtue of the will of *Thomas Palmer*, upon trust to pay the dividends and interest thereof to *E. Palmer* and *S. Palmer* in equal shares for their joint lives, and after the decease of either of them dying unmarried and without issue, to pay over the moiety of such dividends and interest to which the deceased sister should be entitled unto the survivor of them during her life; and in case both or either of the sisters should die leaving husbands or a husband them or her surviving, then upon trust to pay or account for one moiety of the said dividends and interest unto the surviving husband of *E. Palmer* for life for the support of any children she might have, during their minorities; and if there should be no such children, then for his own use and disposal; and the other moiety, after the decease of *S. Palmer*, unto her surviving husband for life in a similar manner. And in case both or either of them the said sisters should leave any child or children living at the time of their or her decease, then, subject to the life interest of their respective

husbands in the said dividends and interest, upon further trust after the decease of *E. Palmer*, to divide one moiety of the capital of the said trust moneys, stocks, funds, and securities among her children equally, or to an only child upon attaining twenty-one. And after the decease of *S. Palmer* to divide the other moiety of the capital among her children in a similar manner. And in case either of them the said *E. Palmer* and *S. Palmer* should die without leaving any lawful child or children living at her decease, or leaving such they should all die under twenty-one in the life-time of the survivor of them the said *E. Palmer* and *S. Palmer*, upon further trust, and subject to the life interest of the husband of the party dying if she should leave one her surviving, to pay over the dividends and interest of the moiety of the said trust funds which belonged to the party dying, unto the survivor of them the said *E. Palmer* and *S. Palmer*, or her assigns, for life; and upon the decease of such survivor to pay and divide the capital of such moiety to or among the lawful child or children of such survivor (if she should leave any) in such and the same way as was thereinbefore mentioned with respect to the dividends, interest, and capital of the original moiety of such survivor in the said trust moneys. But if both of them the said *E. Palmer* and *S. Palmer* should die without leaving any child or children living at the time of their respective decease, or leaving such they should all die under the age of twenty-one, then upon trust to pay and divide the respective moieties of the capital of the trust moneys unto and amongst such person or persons, and in such shares and proportions, as the survivor of them the said *E. Palmer* and *S. Palmer* should by will appoint or bequeath the same; and in default thereof upon trust to pay the same unto and amongst the next of kin of the survivor of them the said *E. Palmer* and *S. Palmer* in a legal course of administration.

Elizabeth Palmer, in the year 1824, married *Daniel Taylor*, and there were two surviving children of the marriage, *Thomas Taylor* and the Petitioner *Daniel William Taylor*, both of whom had attained twenty-one. *Daniel Taylor* died before his wife *Elizabeth*, and she died in February, 1868. *Susanna Palmer* was never married, and died in December, 1873, having made her will, whereby she made certain specific devises and bequests, and gave

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and bequeathed to the Petitioner the residue of her estate and effects whatsoever and wheresoever, and appointed the Petitioner executor of her will.

The moiety of the trust funds, the dividends of which had been paid to *Susanna Palmer* for life, had been paid into Court by the trustees of the settlement.

This Petition was presented by *Daniel William Taylor*, alleging that in the event, which had happened, of *Susanna Palmer* surviving her sister *Elizabeth* and dying without children, no trust was declared by the indenture of settlement of the moiety of the trust funds to which *Susanna Palmer* was entitled, and that, under the circumstances aforesaid, there became a resulting trust thereof in favour of *Susanna Palmer*, and that the Petitioner was entitled thereto as her executor and residuary legatee; and the Petitioner prayed that such moiety might be ordered to be paid to him, or in case the Court should be of opinion that the Petitioner was not entitled to the said sum, then that one moiety thereof might be paid to the Petitioner and the other moiety to *Thomas Taylor*, his brother, and *S. R. Lewin*, to whom the said *Thomas Taylor* had assigned his interest in the trust funds.

Mr. *J. Pearson*, Q.C., and Mr. *Ellis*, in support of the Petition :—

The question raised upon this Petition relates only to the moiety to which *Susanna Palmer* was entitled for life under the settlement of June, 1824. The moiety of *Elizabeth Palmer* would of course go, upon her death after her husband, to her two surviving children. The words of the clause particularly referring to this point are that in case either of the two sisters should die without leaving lawful children, then, subject to the life interest of the husband of the party dying, to pay the dividends and interest of the moiety which belonged to the party dying unto the survivor, and upon the decease of such survivor to divide the capital of such moiety among the children of such survivor in the same way as was directed with respect to the dividends, interest, and capital of the original moiety of such survivor. Now, in the first part of this clause, and in the previous clauses in this settlement, the word "survivor" must necessarily be read survivor in order to give effect to the intention of the deed; and, consequently, the same

word in the latter part of the clause must also be read as "survivor" in its natural sense; and as the survivor died without children, the moiety of the one dying without children cannot go to the children of the other, who was not the survivor.

In the event, therefore, of the survivor dying without children, which has happened, her moiety must go, according to her disposition by will, and the Petitioner, being her residuary legatee, is entitled to her moiety. It is submitted that the word "survivor" cannot be construed "other" in one clause in relation to the same fund where the word "survivor" has its strict meaning in all the other clauses. This has been the effect of all the decisions where "survivor" has been read "other." It was the view taken by Lord *Eldon* in *Davidson* v. *Dallas* (1); and the decision in *Crowder* v. *Stone* (2) was to the same effect. There it was held that the construction of the word in one part of the will must determine its construction in the other part also. In *Leeming* v. *Sherratt* (3) it was also held that the word "survivor" in the residuary clause in the will under consideration must be considered in its natural sense, and not as importing "others," and that that construction in one part of the will must govern the construction of the same word in the other place. *Mann* v. *Thompson* (4) was a similar decision; and in *Re Corbett's Trusts* (5) it was held that the word "survivor" must be read "survivor" and not "other," and that it could not be read "other" merely on the ground of the improbability of the testator intending the interests of the issue to depend on the period of their parents' death. This is not the case of a will in which Courts are in the habit of straining words to effect the intention of a testator. It is a contract between the two sisters, and there is no recital to shew what was the intention. It must, therefore, be read strictly according to the actual words used, and the deed must be construed as an ordinary purchase deed.

Mr. *Bristowe*, Q.C., and Mr. *F. A. Lewin*, for the other child of *Elizabeth Palmer*, cited *In re Arnold's Trusts* (6), but were not called upon to address the Court.

(1) 14 Ves. 576.
(2) 3 Russ. 217.
(3) 2 Hare, 14.
(4) Kay, 638.
(5) Joh. 591.
(6) Law Rep. 16 Eq. 252.

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SIR R. MALINS, V.C.:—

There is no reasonable doubt whatever in this case. It must be assumed upon this settlement made by the two sisters, *Elizabeth* and *Susanna Palmer*, that the intention was this: that each sister was to be made tenant for life of one moiety, with remainder to her husband and remainder to her children in such a manner as that, each sister having children, one moiety would go to one sister's children, and the other moiety to the children of the other sister; but it so happened that one sister, *Elizabeth*, died leaving two children, and the other sister died without having been married. The terms of the settlement with reference to such an event are these: "And in case either of them the said *E. Palmer* and *S. Palmer* should die without leaving any lawful child or children living at her decease, or leaving such they should all die under twenty-one in the lifetime of the survivor of them the said *E. Palmer* and *S. Palmer*, upon further trust, subject to the life interest of the husband of the party dying if she should leave one her surviving, to pay over the dividends and interest of the moiety of the trust funds which belonged to the party dying unto the survivor of them the said *E. Palmer* and *S. Palmer*, or her assigns, for life; and upon the decease of such survivor to pay and divide the capital of such moiety to or among the lawful child or children of such survivor (if she should leave any) in such and the same way as was thereinbefore mentioned with respect to the dividends, interest, and capital of the original moiety of such survivor in the trust funds." Then it provides that if both of the sisters should die without children, then upon trust to pay and divide the respective moieties of the capital to and amongst such persons as the survivor should appoint by will, and in default of appointment to the next of kin of the survivor.

Now the rule is, that the words of a settlement, or of a will, as the case may be, shall be read in their general sense, unless the context shews distinctly that they were not intended to be so used. In the event which has happened one of the sisters has died leaving issue, consequently the last clause does not come into operation.

It has been argued that because the word "survivor" must in several passages be read as survivor, therefore it must be read as

survivor in every part of the document. Now it is the rule of construction that words must be read so as to effect the intention of the parties, and there is no word more flexible than "survivor." It is a doubtful word, used very often without being understood, and frequently it is obvious from the context that it must have been intended to mean "other," and not "survivor." Then, was it the intention of these ladies that the right to possess the capital should survive to the children of either of them who should die leaving children? In my opinion it is plain that the meaning was, if one only should have children, then, after the death of the survivor of them and their husbands, such children were to take the whole of the capital. But the right to the fund is not to depend upon the mother of the children being the survivor. If the sister who dies without children is the survivor, then the whole funds to go to the children of the other; consequently in that case the word "survivor" must be read "other" in order to effect the obvious intention of the instrument.

I consider that the case of *Cole* v. *Sewell* (1) is conclusive on the subject. That was the decision of the House of Lords, and I consider the effect of that decision was, that whether it be in a deed or a will, the word "survivor" must be construed in its ordinary sense, unless the context requires it to be turned into "other," and so this word "survivor" must be read "survivor" if it does not defeat the intention of the instrument; but it is quite evident that if it were so read the intention would be defeated, consequently it must be read "other."

Then with regard to the cases of *Davidson* v. *Dallas* (2), *Wilmot* v. *Wilmot* (3), *Crowder* v. *Stone* (4), and other cases which I had occasion to refer to when I decided *In re Arnold's Trusts* (5), they are all of them authorities in favour of reading the word "survivor" as "other" when it is requisite to do so in order to give effect to the intention.

In this case it appears to me that the terms of the settlement shew plainly that if each of the sisters had children, the children of each were to take a moiety; but if one died without children,

(1) 2 H. L. C. 186.
(2) 14 Ves. 576.
(3) 8 Ves. 10.
(4) 3 Russ. 217.
(5) Law Rep. 10 Eq. 252.

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and the other left children, then the children of that other were to take the whole. Any other construction would entirely defeat the intention. The decree will therefore be:—"The Court being of opinion that in the events which have happened the moiety of which *Susanna Palmer* was tenant for life devolved, on her death without having been married, on the two surviving children of *Elizabeth Taylor* under the settlement of the 12th of June, 1824, let the fund in Court be sold, and let the costs of all parties be taxed (allowing only one set of costs to *S. R. Lewin* and *F. P. Taylor*) as between solicitor and client; and let the residue of all the funds be paid in equal moieties between the Petitioner and the Respondents."

Solicitor for the Petitioner: Mr. *J. Lott.*
Solicitors for the Respondent: Messrs. *Lewin & Co.*

WILCOCKS *v.* CARTER.

V.-C. B.
1875
Jan. 28.

[1875 W. 13.]

Injunction—Proceedings in Probate Court—Undertaking not to question Validity of Will.

Injunction granted to restrain proceedings in the Probate Court by heir-at-law and next of kin for the purpose of obtaining administration and opposing probate of a draft will in contravention of an undertaking and deed by which Defendants admitted the validity and confirmed the dispositions of the draft will, giving up all interest which they would have taken in the event of an intestacy.

Cited by L.J.J. 46 W.R. 10 Ch. 440

MOTION on behalf of the Plaintiffs, Mr. and Mrs. *Wilcocks*, for an injunction to restrain the Defendants from further prosecuting the pending proceedings in the Probate Court, and from taking any other proceedings for the grant to either of them of letters of administration to the estate and effects of the testator, *James Carter;* and from taking any proceedings in the Probate Court in opposition to the grant to the Plaintiffs of probate of the testator's will.

The case of the Plaintiffs was that *James Carter* made a will in 1870, giving all his real estate (subject to the charges contained in his father's will in favour of members of his family, including the Defendants *Edmund* and *William Carter*) and also all his personal estate unto his niece, the Plaintiff (then *Jane Carter*, spinster), whom he appointed sole executrix.

After his death, in March, 1874, the will could not be found, although the testator had a few days before his death stated that he had left a will. A draft of the will, however, had been preserved, and accordingly something in the nature of a family arrangement was entered into between *Jane Carter* and *William* and *Edmund Carter*, who signed an undertaking which was afterwards carried out by deed. By this deed, dated the 25th of March, 1874, after reciting the contents of the lost will, and that *William* and *Edmund Carter*, as heir-at-law and two of the next of kin of the testator (the remaining next of kin, other than *Jane Carter*, being of weak intellect and incapable of entering into any arrangement), were satisfied, from a reference to the draft of the will which had been preserved, and from the declarations of the attesting witnesses thereto, that a will to the recited purport and effect was

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duly executed on the day it purported to bear date, and had not been revoked or altered; and that *William* and *Edmund Carter* were desirous of giving full effect to the said will so far as respected any estate or interest in the real and personal estate to which they would have been entitled in the event of the testator having died intestate; it was witnessed that for effectuating the said purpose, and in consideration of the premises, *William Carter* thereby granted and confirmed unto *Jane Carter*, the Plaintiff, her heirs and assigns, all the testator's real estates and all the estate, right, &c., of him the said *William Carter*, as heir-at-law, in the hereditaments thereinbefore assigned. And for further effectuating the purposes aforesaid, and in consideration of the premises, the said *William Carter* and *Edmund Carter* thereby assigned unto the Plaintiff, her executors, administrators, and assigns, all and every the parts, shares, and interests of them, or to which they would have been entitled if *James Carter* had died intestate, of and in his personal estate and effects.

After signing this deed in pursuance of their undertaking, *William* and *Edmund Carter* subsequently changed their minds, and insisted that the testator had destroyed his will with the intention of revoking it, and that they had signed the undertaking and executed the deed before discovering the real facts of the case. In October, 1874, they applied in the Probate Court, as next of kin, for a grant of letters of administration to *James Carter*. In November, 1874, an opposition to the grant of administration was entered on behalf of the Plaintiff as sole executrix and universal legatee. She then filed a petition, raising the question whether *William* and *Edmund Carter* had not, by executing the deed of May, 1874, precluded themselves from applying for administration.

William and *Edmund Carter*, in their answer to the petition, admitted having executed the deed, but stated that it was obtained by misrepresentation, and without proper legal advice, and was not in equity binding on them. A summons was afterwards taken out by the Plaintiff in the Probate Court for *William* and *Edmund Carter* to shew cause why all further proceedings in that Court should not be stayed until a Court of Equity should have determined whether or not the undertaking and deed, admitted by *William* and *Edmund Carter* in their answer to have been signed and executed by them, were binding on them.

On the 12th of January, 1875, the summons was dismissed by the Judge of the Probate Court, who said that he had jurisdiction to try the question raised, and would not send it from the Probate Court; and a subsequent application for time until proceedings in this Court should be taken was refused.

The Plaintiff and her husband thereupon filed the present bill to restrain proceedings by the Defendants *William* and *Edmund Carter* for obtaining adminstration to *James Carter's* estate, and from taking any proceedings in that Court in opposition to the grant to the Plaintiffs of probate of *James Carter's* (draft) will.

Mr. *Kay*, Q.C., and Mr. *Caldecott*, in support of the Plaintiffs' motion, referred to *Gascoyne* v. *Chandler* (1), where Lord *Hardwicke* granted an injunction to restrain proceedings in the Ecclesiastical Court to set aside a paper writing purporting to be a will, on the ground that the Defendants, "having agreed that this paper writing should be established as a will, they ought not in conscience to be permitted, at least for the present, to controvert this matter in the Ecclesiastical Court; nor at all, if finally at the hearing of the cause the agreement should be established which went to the question at the hearing": In a note at the foot of that case (2) it is stated that in *Sheffield* v. *Duchess of Buckingham* (Michaelmas Term, 1739), the Duchess was restrained from questioning the validity of the will of the Duke, her husband. Unless the injunction were granted, there would be a double litigation to try the same question, viz., the validity of the undertaking and deed signed by the Defendants, which is essentially a question for a Court of Equity; the Court of Probate having no jurisdiction to set aside the deed.

Mr. *De Gex*, Q.C., and Mr. *Jolliffe*, for the Defendants:—

The Court will not give any assistance to the Plaintiffs, who are seeking to obtain the benefit of a purely voluntary deed: *Tufnell* v. *Constable* (3).

The proceedings in the Probate Court will determine all questions between the parties, and ought not to be restrained, as, if the will be established, there will be nothing for the deed to operate upon; and if, on the other hand, letters of administration

(1) 3 Sw. 418, n. (2) 3 Sw. 421. (3) 8 Sim. 69.

V.-C. B. 1875 WILCOCKS v. CARTER.

should be granted to the Defendants, their rights will be established as paramount to any claim set up by the Plaintiffs under the deed (to set aside which the Defendants are prepared to file a bill) or the non-existent will. Moreover, the rights of the creditors to have the testator's personal estate administered by the proper hands ought not to be interfered with, or the rights of one of the next of kin, not before the Court, prejudiced, by granting the injunction.

SIR JAMES BACON, V.C.:—

I think, both upon principle and upon authority, the Plaintiff is entitled to the injunction asked for.

It is said that this deed is without consideration, but I do not read it so; and even should that be the case, the Defendants will have an opportunity of pleading that and arguing the question. At present I do not think it is. The bill recites that there was a duly executed will, and that it has never been revoked. The will contains a charge in favour of the Defendants. That charge is secured to them by this deed, which is by no means, as it strikes me at present—though it is not necessary to decide it, I observe it, because Mr. *De Gex* argued it—without consideration. Then the rest of the case is as clear as it can possibly be. Can this Court permit any person to take proceedings in derogation of his own grant and deed? That question is very readily answered. What the Defendants are doing is in direct violation and derogation of their deed. More than that, it is not disputed that there are two questions as the matter now stands, one of which the Court of Probate can have no jurisdiction over, nor is it said that that Court has ever intended to exercise any jurisdiction of that sort; and the second question, namely, the validity of the deed, the Defendants announce to me upon this occasion it is their intention to litigate by filing a bill. If the case of *Gascoyne* v. *Chandler* (1) had not been in existence I should entertain the same view upon the subject. Being, as it is, in my opinion, a plain direct authority, and also proceeding upon a sound principle, I do not hesitate to grant an injunction in the terms asked for.

Solicitors: Mr. *R. T. Jarvis*, agent for Mr. *J. R. Picard, Kirkby Lonsdale;* Messrs. *Bower, Son, & Cotton.*

(1) 3 Sw. 418, n.

In re NUNN'S TRUSTS.

V.-C. H.
1875
Jan. 29.

Will—Construction—Bequest to "My Housekeeper"—Error in Christian Name.

Testator, by will dated in 1874, shortly before his death, bequeathed to his executors a sum of New £3 per Cent. Annuities, upon trust to sell the same and apply the proceeds in the purchase of a life annuity in "the name and for the benefit of my housekeeper, *M. R.*, whether living in my service at the time of my death or not." *M. R.* had left the testator's service six or seven years before, and married in 1871, and her sister, *E. R.*, had been since 1870, and was at the time of the testator's death, in his service as his housekeeper:—

Held, that the primary description of the legatee, "my housekeeper," and not the name, was in this case the guide to the testator's intention, and that *E. R.* was entitled to the fund.

CHARLES NUNN, who died on the 17th of August, 1874, by his will, made three days before that date, bequeathed to his executors all the New £3 per Cent. Annuities which should be standing in his name at the time of his death, upon trust within three calendar months after his death to sell the same and apply the net proceeds of such sale in the purchase from Government, "in the name and for the benefit of my housekeeper, *Maria Rumsey*, whether living in my service at the time of my death or not," of an irredeemable annuity for her life. The testator directed that the annuitant or her executors or administrators should not be allowed to have the value of the annuity in lieu thereof. He made a codicil to his will giving other legacies, but not affecting the above-mentioned annuity, and otherwise confirming the will. At the testator's death there was a sum of £1450 New £3 per Cent. Annuities standing in his name in the books of the *Bank of England*. Some years prior to his death, and for a considerable period of time, *Maria Rumsey* was the testator's housekeeper, but she quitted his service in the year 1867 or 1868, and in 1871 married *John Reynolds*. *Maria Reynolds'* sister, *Emma Rumsey*, was at the dates of the testator's will and death in his service as his housekeeper, having entered it on the 14th of June, 1870. *John* and *Maria Reynolds* for themselves, and *Emma Rumsey* for herself, claimed the above sum of annuities, and the executors thereupon transferred it into Court under the Trustee Relief Acts.

V.-C. H. 1875 *In re* NUNN'S TRUSTS.

This was a Petition presented by *Emma Rumsey*, praying that after the costs had been provided for out of the fund, the residue might be ordered to be paid to her. The evidence shewed that the Petitioner left the service of the testator temporarily in January, 1874, on account of not being in good health, and returned in February, 1874, and was in his service at the dates of the will and death. The testator made a former will, by which he bequeathed to *Maria Rumsey*, who was at that time in his service, a legacy of £400, if in his service at his death, but that bequest was not repeated in his last will.

Evidence was tendered that in the week preceding his death the testator sent to the solicitor whom he had usually employed, instructions for a fresh will, in which the name of *Emma Rumsey* was written, but owing to that solicitor's absence from *London*, or illness, another solicitor was employed, who in the hurry of preparing the will erroneously, as alleged, wrote *Maria* instead of *Emma Rumsey*. The case of *Grant* v. *Grant* (1) was referred to in support of the admissibility of this evidence, but on objection being taken on the part of the Respondents, *John* and *Maria Reynolds*, the Court refused to receive it.

Some of testator's letters were produced to shew that the Petitioner was the person meant to be provided for.

Mr. *Hadley*, for the Petitioner, contended that the evidence clearly shewed that she was the housekeeper whom the testator intended to benefit. She was his housekeeper at the time of his death, and therefore she fulfilled the material portion of the description given in the will of the person whom he contemplated providing for, and that being so, the mere calling her by a wrong Christian name would not deprive her of the annuity.

Mr. *Ince*, for the Respondents, *John* and *Maria Reynolds*, submitted that the words in the will did not describe the Petitioner, but applied as much or more to *Maria Reynolds*, who had been the testator's housekeeper. The change of the surname of a woman on marriage was a mere matter of custom, and no doubt the testator, even after *Maria's* marriage, had her in his contemplation as *Maria Rumsey*. Certainly *Maria* and her husband did

(1) Law Rep. 5 C. P. 727.

visit the testator, and he must, therefore, have known when he spoke of his housekeeper *Maria* which sister he meant to provide for. The cases shewed that when the Court was called upon to decide a question of this sort the name of the legatee rather than the description must be the guide, and therefore he submitted that *Maria Reynolds* was entitled to the annuity. [He referred to *Gillett* v. *Gane* (1), *Farrer* v. *St. Catharine's College, Cambridge* (2), and *Garner* v. *Garner* (3).]

Mr. *Everitt*, for the executors, said the residuary legatees were not before the Court, and suggested that the bequest was void for uncertainty. [He referred to *Drake* v. *Drake* (4).]

SIR CHARLES HALL, V.C.:—

I am of opinion that this case is not one which is governed by the authorities in which it has been held that the name of the legatee should be the guide to the testator's intention. The primary description in the will of the legatee is supplied by the words "my housekeeper." The testator provided for his housekeeper whether in his service or not at the time of his death. The testator added the name, and the bequest must be read as a direction to purchase "in the name and for the benefit of my housekeeper," whose name is "so and so." Adding a name, though an erroneous one, does not prevent the gift taking effect for the benefit of the person who was then his housekeeper. The evidence clearly shews that the Petitioner was such housekeeper, for though she had in January, 1874, gone away ill, she had returned, and filled that character at the time of his death. If the testator had intended to provide for *Maria Reynolds*, he would have referred to her as "my former housekeeper." The Petitioner asks that, after due provision be made for the payment of the costs, the residue of the fund in Court be ordered to be paid to her; and the authorities shew that when a will contains a direction to purchase an annuity for a legatee, the legatee may have the price of it instead. The order will, therefore, be as prayed.

Solicitors: Messrs. *Nunn & Winkworth*; Mr. *Wilkin*.

(1) Law Rep. 10 Eq. 29.
(2) Ibid. 16 Eq. 19.
(3) 29 Beav. 114.
(4) 25 Ibid. 642; 8 H. L. C. 172.

V.-C. H.
1875
Feb. 23.

COLLISS *v.* HECTOR.

[1872 C. 145.]

Marriage between Turkish and English Subjects in England—English Settlement—Decree of Divorce in Turkey—Foreign Judgment—Absence of Notice.

15 L.T. 626
6 P.D. 42

A settlement on a marriage in *England* between a domiciled Turkish subject and an English lady, on the faith of his promise to reside in *England*, *held* to be governed by English law.

A divorce in *Turkey*, the effect of which by Turkish law was to annul the settlement, but which was pronounced without notice to the wife or the persons interested under the settlement, disregarded.

On the 5th of May, 1868, *Madeline Colliss*, widow of *Henry Colliss*, who died in 1864, intermarried with *Christian Anthony Rassam*. Mrs. *Rassam* was born in *India* of English parents, and there she resided during the time of her marriage with Mr. *Colliss*, but about twelve months after his death she came to this country with the intention of permanently settling in *England*. Mr. *Rassam* was an Ottoman subject, domiciled at *Moussul*, in *Turkey*, where he held the office of Vice-Consul to the English Government, but at the time of his marriage he was residing in this country. When *Rassam* made proposals of marriage to Mrs. *Rassam*, she objected to entertain them on the ground that she did not wish to spend her life at *Moussul*. To get over that objection, *Rassam* promised to reside permanently in *England*, and stated that he would simply go over to *Moussul* to realise his property there, and would then come back and settle in *England* for the remainder of his life. Upon the faith of that promise Mrs. *Rassam* became his wife. The marriage took place in a church in *London* according to the rites of the Church of *England*.

An indenture of settlement was prepared, and it was executed by both the husband and wife. It was dated the 4th of May, 1868, and recited that *Rassam* resided at No. 150, *Queen's Road*, *Bayswater*, and the intended wife at No. 50, *Pembridge Villas*, *Bayswater;* that there were two children, the issue of her first marriage living; that he was possessed of certain railway and other bonds, and that he had agreed to deliver, and had delivered, them to the two trustees of the settlement to hold upon and

for the trusts declared, which were to retain the bonds during his life, or, if he should, in writing, so direct, to sell them and invest the proceeds in the trustees' names in stocks or funds of the *United Kingdom*, of the Government of *India*, of the *Bank of England*, or upon mortgage of real estate in *England*, *Wales*, or *Ireland*, or upon railway debentures, and to pay the income to Mr. and Mrs. *Rassam*, and the survivor for life; and in case she should be the survivor, she was to receive and enjoy such income during her life for her separate use, without power of anticipation, and after the death of the survivor the trustees were to pay the income, and the capital in certain events, for the benefit of Mrs. *Rassam's* children of her former marriage and of that marriage—they taking vested interests only provided they should attain the age of twenty-one years or marry with consent before that age. It was provided that if no child should become entitled to the trust fund the trustees were to stand possessed of the same upon trust for *Rassam*, his executors, administrators, and assigns absolutely.

Soon after the marriage Mr. and Mrs. *Rassam* went to *Moussul*. She left her two infant children in *England*. After the lapse of three years Mrs. *Rassam* became desirous of seeing them, and she solicited the consent of her husband to her coming to *England*. He for some time refused to give it, but he ultimately gave his consent, and himself paid the passage-money for herself and their only child, a daughter born in *Turkey*, and gave Mrs. *Rassam* an order, dated July, 1871, on his agents in *London* to pay her £10 a month. Mrs. *Rassam*, with her child, arrived in *England*, but when in September, 1871, she applied to the agents, she was informed by them that the order given to her had been cancelled by *Rassam*. Mrs. *Rassam*, being left in *England* without any means of subsistence, was supported by her father, who communicated with Mr. *Rassam*, but obtained no satisfactory answer. *Rassam* died at *Moussul* in May, 1872, and his administrator in *Turkey* was the Defendant *H. Rassam*, one of the trustees of the settlement. Mrs. *Rassam* was in June, 1872, informed, for the first time, that after she left *Turkey* Mr. *Rassam*, in March, 1872, obtained a decree of divorce from her in a Turkish Court, and also that as she and *Rassam* and their infant child were Turkish subjects, their rights would be governed by the law of *Turkey*.

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In July, 1872, this bill was filed by the three children of Mrs. *Rassam* against the trustees of the settlement and Mrs. *Rassam*, and they submitted that whatever might be the effect of the decree of divorce, if in fact any was obtained, it could not affect their rights under the settlement; and they prayed that the trusts of the settlement might be carried into execution by the Court; for inquiries whether any decree of divorce had been obtained, and, if so, what was its effect on the limitations of the settlement; and for consequential relief. The evidence shewed that Mrs. *Rassam* had no notice of the proceedings in the Turkish Courts, and that not one of her children was made a party to them.

The trustees, by their answer, stated that *Rassam* was a Chaldean Turkish subject, and submitted to act as the Court should direct; and also that if, under the circumstances stated, the trusts had, according to the laws of *Turkey* as affecting Chaldean Turkish subjects and their property, become absolutely void, other persons would be beneficially entitled to the funds, and ought to be made parties to the suit. The decree of divorce, dated the 2nd of March, 1872, was in the Chaldean language, but a translation was set forth in the answer. The proceedings were in the Ecclesiastical and Patriarchal Court of the Patriarch of *Babylon*, and the decree, after reciting the deposition of *Rassam* before those who presided on that occasion, in which he complained of Mrs. *Rassam's* conduct, and stated that he was compelled to expel her his house; that he took her with him to *Bagdad*, and sent her thence to *England*, and declared that she was separated and divorced from his house, for the causes therein set forth, and excluded and shut out from the settlement and heritage during his life and after his death, concluded thus: "We, therefore, in our Court assembled, having searched and examined into the facts of all that has been adduced, the truth of which has been vouched for according to our judgment by the evidence of trustworthy and honest witnesses, do now give our testimony and decision to this effect, and in witness thereof we hereunto set our signatures and seals with our own hands." The decree was signed by the Patriarch of *Babylon*, the Metropolitans of *Malabar* and *Ackir*, and four priests, and witnessed by four Christians and four Mahomedans.

The Defendant *Hurmuzd Rassam*, stated that he in a letter

written and sent by him to the father of Mrs. *Rassam*, dated the 13th of October, 1871, mentioned that his brother's charges against his wife were such as to compel him to sue for a divorce; and that Mrs. *Rassam's* father said he had shewed that letter to her. The Defendants believed that *Rassam*, in November, 1871, informed his wife by letter of the reason why he revoked the order on his agents in *London*, and stated that they were advised that, according to the laws of *Turkey* as affecting Chaldean Turkish subjects and their property, the effect of the decree of divorce was to render absolutely void and of no effect the trusts of the settlement. The evidence shewed that after the death of *Rassam* a further decree or certificate was, on the 1st of September, 1872, obtained by two of his brothers resident at *Moussul*, from the Patriarch of *Babylon*, and that both that and the former decree in *pari materiâ* were by the Turkish law affecting Turkish Chaldean subjects equally binding, although the husband might have died between the date of the first and second decrees.

The trustees had obtained a deposition from the Syriac Archbishop of *Moussul* shewing what by the laws of *Turkey* governing Turkish Chaldean subjects were the rights, and powers, or privileges of Turkish husbands over their wives; and stating that the only way in which, according to Turkish law, a settlement could be made on a wife on marriage was for the settlor to declare that he was indebted to his wife in the sum of money he wished to settle. He then mortgaged his property to her as security for the payment of the money, and she gave him a bond or contract granting him the income of the fund for his life, but no provision could be made for his children after his death, nor could a portion or provision be made for the children of a stranger; and in case a settlement was made on a wife, and she was afterwards divorced, she lost all benefit under the settlement, and the husband ceased to be indebted to her, notwithstanding his written statement to the contrary.

Mrs. *Rassam* denied all the charges against her.

Mr. *Lindley*, Q.C., at the commencement of his argument, suggested that the Defendant *H. Rassam*, one of the persons interested in Mr. *C. A. Rassam's* estate, should, under the pro-

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visions of the 15 & 16 Vict. c. 86, s. 44, be appointed to represent the parties who might be entitled to *Rassam's* estate, notwithstanding that he was a trustee under the settlement.

Mr. *Dickinson*, Q.C., stated that the Defendant *H. Rassam* objected to be placed in that position; and submitted that in this case the Act did not apply.

The VICE-CHANCELLOR:—Let a note be made by the Registrar of the fact that the Defendant *H. Rassam*, not desiring but declining to be appointed to represent his brother's estate, which, notwithstanding that he is a trustee under the settlement, I think, consistently with a proper interpretation of the Act, might have been done, the case must proceed without any such appointment.

Mr. *Lindley*, Q.C., and Mr. *Crossley*, for the Plaintiffs, after stating the facts of the case, submitted that as this was a settlement made in *England* in the English form, it must be governed by English and not by Turkish laws, and that the Plaintiffs were entitled to have the trusts of the settlement executed by this Court. The fact that *Rassam* was domiciled at *Moussul* would not prevent this Court from carrying out the trusts of the contract which he entered into in this country: *Van Grutten* v. *Digby* (1); *Watts* v. *Shrimpton* (2). The Defendants had endeavoured to make out that *Rassam* having been domiciled in *Turkey* at the date of the settlement, he was incompetent to make any such settlement; and for that purpose they had obtained legal opinions from *Turkey*. Those opinions were to the effect that the settlement was, according to the laws of *Turkey*, invalid; but that defence could be material only upon the question of costs. As to the proceedings for the purpose of obtaining a divorce, they were instituted in a Court which had no jurisdiction in the matter; but assuming that it had jurisdiction, as the decree was obtained in the absence of the wife, and without notice to her, this Court would not recognise those proceedings. Having regard, however, to the comity of nations, no English Judge would hold that this decree of divorce had any effect whatever, either over persons married in this country or upon the rights of other persons

(1) 31 Beav. 561, 562. (2) 21 Beav. 97.

under the settlement: *Duchess of Kingston's Case* (1); *Ferguson* v. *Mahon* (2).

[The VICE-CHANCELLOR referred to *Simpson* v. *Fogo* (3).]

Mr. *W. Pearson*, Q.C., and Mr. *C. Browne*, for the Defendant, Mrs. *Rassam*, submitted that she had, in the most explicit and positive manner, denied that there was one iota of truth in the statements made against her, and which were the ground of the declaration of divorce by the ecclesiastical judges in *Turkey*. The authorities were overwhelming on the question that this was an English settlement, and that it must be governed by English laws. They referred to *Burge's* Commentaries on Colonial and Foreign Laws (4): *Story's* Conflict of Laws (5); *Tollemache* v. *Tollemache* (6); *Shaw* v. *Gould* (7); *In re Alison's Trusts* (before Vice-Chancellor *Malins*, Dec. 4, 1874); *Don* v. *Lippman* (8); and *M'Carthy* v. *Decaix* (9); and contended that Mrs. *Rassam* was, under the settlement, entitled to the income of the fund for her life, and that the fund ought not to be burdened with the costs of the trustees.

Mr. *Dickinson*, Q.C., and Mr. *Smart*, for the trustees:—

The bill raises the question of the legality of the proceedings which took place in *Turkey*. The trustees' duty was to make every inquiry into them, and they were advised that the decree of divorce had the effect of saying that the settlement was void, that Mrs. *Rassam's* child born in *Turkey* was illegitimate: *Munro* v. *Munro* (10); that Mr. *Rassam's* property reverted to his estate, and that other persons had become interested in the property. Under the circumstances of the case it was impossible for the trustees to pay the income to Mrs. *Rassam*, and it was necessary that the matter should come before the Court, in order that the trustees might state all the facts of the case, and that there were other claims to

(1) Smith's L. C. 6th Ed. vol. ii. pp. 726, 727.
(2) 11 A. & E. 179.
(3) 1 J. & H. 18.
(4) Vol. i. pp. 27, 28.
(5) 7th edit. §§ 76, 239, 240, 266, 276.
(6) 30 L. J. (P. M. & A.) 113.
(7) Law Rep. 3 H. L. 55–85.
(8) 5 Cl. & F. 1.
(9) 2 Russ. & My. 614.
(10) 7 Cl. & F. 842.

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the fund. The course which they had pursued was perfectly proper and clear, and therefore they ought to be allowed all their costs properly incurred. The fund they would pay into Court, and there ought to be an application by Mrs. *Rassam* to be paid the income, and that application ought to be served upon the parties who claimed the fund, and who were not parties to this suit.

SIR CHARLES HALL, V.C.:—

At one time it was my intention to make the Defendants—the trustees—pay some portion of the costs of this suit, but the conclusion at which I have arrived is that the evidence given, and the discussion, have been advantageous to the children and widow, and therefore I am not disposed to make the trustees pay any costs. As to the merits of the case, after the most careful investigation of the facts and circumstances on the part of the trustees, and their evident anxiety to leave nothing uncommunicated to the Court which could in any way tend to establish rights founded upon the invalidity of the settlement, I have not any doubt which would justify me in not dealing with the case upon the footing that the settlement is a perfectly valid one, and must have effect given to it. The answer of the trustees states that, according to Turkish law, something has taken place in *Turkey* which has done away with the settlement; but I hold that this was, and remains, and must be construed as, an English settlement. It has been said that when the parties married they anticipated going to reside in *Turkey*, but the evidence establishes that they must have contemplated living in *England*. What *Rassam*, in his own mind, contemplated I will not say; but I am satisfied that he represented to Mrs. *Rassam* that he meant to leave *Turkey* and come to reside and be domiciled in *England*. The evidence of Mrs. *Rassam*, and of independent witnesses who had conversations with *Rassam*, proves that he made representations to Mrs. *Rassam* that he would reside in this country; and that she accepted his offer of marriage upon the faith of his doing so. There is nothing in the evidence or in the letters which she wrote to induce me to think that Mrs. *Rassam's* evidence is not trustworthy. The settle-

ment, therefore, being an English contract, must be expounded according to English law, and the rights of the parties claiming under it must be recognised and dealt with according to the same law. Assuming that, by the proceedings which took place in *Turkey*, the marriage was, by the law of *Turkey*, rendered null and void, and the contract and settlement became of no effect in *Turkey*, I must hold that the Turkish Court could not make void an English settlement in the absence of parties taking benefits under it, and, therefore, that the proceedings which took place in the absence of the Plaintiffs and Mrs. *Rassam* are not, in this Court, worthy of any attention. But I am by no means satisfied that the proceedings in *Turkey* were either proper, or that they were before a Court having jurisdiction in the matter. The opinions which have been obtained in reference to Turkish law are not worthy of consideration, for they are not based upon the English contract, but set forth hypothetical cases. The trustees do not state that they took the opinion of English counsel upon the validity of the settlement, having regard to what took place in *Turkey*, and I hold that I ought not to deal with the case in any way upon the view that the validity of the settlement and the interests of the parties to the contract have been brought into question, but that, on the contrary, I must deal with the settlement as being a complete and perfect one, and as giving rights to parties who now claim under it. Those persons who claim rights on the footing that the settlement is void might have taken a course of their own, but they have not commenced any proceedings to establish their alleged rights; they have waited to see what would become of this suit, because they knew that one of the trustees was a brother of Mr. *Rassam*, and would have to be a party to the proceedings, and look after their interests. He has made use on their behalf of all the evidence that could be obtained in *Turkey*. I allowed him the option of being formally appointed to represent (as legal personal representative of *Rassam*) their interests in this suit, which he declined to accept. Acting on the view that the settlement is a perfect and complete one, and not affected in any way by the proceedings which have taken place, I hold that the widow is entitled to be paid the income of the

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fund at once. The trustees being willing to retire from the trusts, two new trustees must be appointed, and the trust property, after the costs, charges, and expenses of the present trustees have been provided for, must be transferred to the new trustees, and they must pay the income of the fund to Mrs. *Rassam* during her life. If the three children should die under twenty-one years of age, and without having married with consent, the ultimate trusts will have to be executed.

Solicitors: Mr. *Joseph E. Turner;* Messrs. *Smith & Co.*

NORTON *v.* RUSSELL.

M. R.
1875
Jan. 13.

[1874 B. 32.]

Partnership—Suit by Executors of deceased Partner—Conduct of surviving Partner—Neglect to render Account—Costs up to Hearing.

In a suit by the executors of a deceased partner against a surviving partner who was bound under the articles to pay them annually half the profits of the business, the bill alleging that no accounts had been rendered, though application had been made, for some years, but not alleging that anything was due from the Defendant, and praying for an account and for the winding-up of the partnership—the Defendant having by his answer admitted the allegations in the bill and submitted to render an account without alleging that nothing was due:—

Held, that the Defendant must pay the costs up to the hearing.

THIS was a suit by the executors of *Joseph Hockley* against *Thomas Russell*, the surviving partner of their testator, praying for the usual partnership accounts, and that the business might be wound up.

Joseph Hockley and the Defendant had carried on business under an indenture of the 17th of March, 1860, which contained provisions, in the event of the Defendant surviving *Hockley*, and in other events which happened, that the Defendant should, on the 1st of January in every year, pay to the executors or administrators of the said *Joseph Hockley* such a sum as would be equal to one moiety of the net profits of the business for the year then last past, and that such payment should continue until the Defendant should redeem the same in manner therein mentioned.

The partnership business continued till the death of *Hockley*, which took place on the 30th of June, 1868.

In July, 1872, the Defendant received a letter asking for the accounts of the partnership, which he neglected to render, and after several applications the present bill was filed alleging that such applications had been made, but that no accounts had been rendered of the profits of the partnership or the state of the accounts, and praying for the usual partnership accounts, that the business might be wound up, and that the Defendant might be ordered to pay the costs of the suit, and the costs, charges, and expenses

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occasioned by the Defendant's delay in rendering the accounts. The bill did not allege that there was anything due from the Defendant.

The Defendant by his answer admitted the truth of the allegations in the bill, and admitted that applications had been made to him, but said that he had been prevented from rendering the accounts by his business engagements. He submitted to render such account as the Court might direct. The answer did not allege that nothing was due.

The only question now before the Court was as to who should pay the costs of the suit up to the hearing.

Mr. *Roxburgh*, Q.C., and Mr. *Meyricke*, for the Plaintiff, contended that this was not the case of an ordinary partnership suit, and that the costs up to the hearing ought to be borne by the Defendant. They referred to *Vyse* v. *Foster* (1); *Taylor* v. *Taylor* (2).

Mr. *Cookson*, for the Defendant:—

There is nothing in this case to lead the Court to depart from the ordinary rule that in a partnership suit each party should bear his own costs up to the hearing. In *Hawkins* v. *Parsons* (3), which was the case of a suit for dissolution of partnership rendered necessary by the non-fulfilment on the part of one of the partners of a covenant in the partnership articles that he would diligently carry on and manage the business, the Court refused to deviate from its usual course, or to direct the Defendant to pay the costs up to the hearing; and the late Master of the Rolls observed that it was only in gross cases, such as misapplication of the partnership assets, that the ordinary rule as to costs should be varied. Here, the Court is dealing with a suit by executors where the costs are asked for against the Defendant on the ground that the surviving partner stands in some way in a fiduciary position towards the Plaintiff. That is a notion which has sometimes been entertained, but is distinctly overruled by *Knox* v. *Gye* (4). Here the bill merely asks

(1) Law Rep. 8 Ch. 309; S. C. Ibid. 7 H. L. 318.
(2) 28 L. T. (N.S.) 189.
(3) 10 W. R. 377.
(4) Law Rep. 5 H. L. 656.

for an account, not for any specific sum claimed to be due; and there is no case where a Defendant under such circumstances has been made liable to pay the costs up to the hearing.

SIR G. JESSEL, M.R.:—

If there were no cases on the authority of which I could be called upon to make the Defendant pay the costs up to the hearing, I should have no hesitation in making a precedent.

The Defendant is the surviving partner in a firm under articles which provided, in effect, that in case of the Defendant being the surviving partner he should pay annually to the executors of the deceased partner a sum equal to one-half of the net annual profits. From the time of the death of the partner, which took place on the 13th of June, 1868, no account of such profits and no account of the partnership was rendered. In 1872 the Defendant receives a letter demanding an account, but none is given. The Plaintiff then files his bill, and the Defendant puts in an answer, admitting the statements of the bill, and submitting to render an account, but not stating that nothing is due from him. In that state of things I must take it to be admitted that something is due from him; and on that assumption I have no hesitation in now making a decree directing that the Defendant should pay the costs up to the hearing, though if there had been no ground for that assumption, I should have reserved the question of costs.

Solicitors for the Plaintiffs: Messrs. *Knox & Mould.*
Solicitors for the Defendant: Messrs. *Bolton, Robbins, & Busk.*

M. R.
1875
Jan. 15.

LACEY *v.* HILL.

[1870 L. 94.]

LENEY *v.* HILL.

[1870 L. 93.]

Dower—Freebench—General Devise of Real Estate—Devise for Benefit of Widow—Dower Act (3 & 4 *Will.* 4, *c.* 105), *ss.* 4, 9—*Wills Act* (1 *Vict. c.* 26), *ss.* 2, 3.

A testator, by his will (made in 1861), devised all his real estate and bequeathed his personal estate to trustees upon trusts for sale and conversion; and he directed his trustees, out of the proceeds of such sales, to pay his debts and funeral and testamentary expenses, and to invest the surplus as therein mentioned, and out of the income of the investments to pay an annuity to his widow, and subject to such annuity to stand possessed of the investments upon trusts for the benefit of his children. The testator (who had married after the *Dower Act* came into operation) died entitled to freeholds and copyholds which he had purchased. The conveyances of the freeholds were not made to uses to bar dower, nor did they contain any declaration against dower. The copyholds had not been surrendered to the uses of his will:—

Held, that the widow was barred of any right to dower both by sect. 4 and by sect. 9 of the *Dower Act:*

Held, also, that she was deprived of any right to freebench by virtue of sect. 3 of the *Wills Act.*

Dicta in *Rowland* v. *Cuthbertson* (1) dissented from.

THIS was an adjourned summons raising the question whether Lady *Henrietta Harvey*, the widow of Sir *Robert Harvey*, was entitled to dower or freebench out of certain freehold and copyhold estates, the property of Sir *Robert Harvey.*

The marriage of Sir *Robert* and Lady *Henrietta Harvey* took place on the 12th of August, 1845.

The estates in question were purchased by Sir *Robert Harvey* at various times subsequent to the marriage. The conveyances of the freeholds were not made to uses to bar dower, nor did they contain any declaration against dower. The copyholds were not surrendered to the uses of Sir *R. Harvey's* will.

The will of Sir *R. Harvey* was dated the 10th of May, 1861,

(1) Law Rep. 8 Eq. 466.

and thereby the testator devised all his real estate (except estates vested in him as a trustee or upon mortgage) to trustees upon trust that they should (if and when they should in their absolute discretion think it desirable to do so, but not otherwise) sell the same; and he bequeathed his personal estate to the same trustees upon trust to sell, call in, and convert such part thereof as should not consist of money; and he directed his trustees, out of the proceeds of such sales and the money which he should be possessed of at the time of his death, to pay his funeral and testamentary expenses, and to invest the surplus, and out of the income of the said trust funds to pay to his wife the annual sum of £3000 during her life so long as she should continue his widow; but in case she should marry again, then to pay to her the annual sum of £1500 only; and, subject to the payment of such annual sums, to stand possessed of the said trust funds and the investments thereof for his children as therein mentioned; and he declared that until a sale of his real and personal property his trustees should apply the rents and profits of the property remaining unsold in the manner in which the interest of the money to be produced by a sale thereof would be applicable if the same were then sold.

Sir *Robert Harvey* died on the 19th of July, 1870. His estate proved insolvent, and these suits were instituted by creditors for administration of his real and personal estate. A decree had been made under which Sir *R. Harvey's* real estate was sold. Upon the sale the question arose whether Lady *Henrietta Harvey* was entitled to dower or freebench: and she agreed to join in the sale upon the terms of a portion of the purchase-money being set apart to answer any claim of hers. Such sum had been set apart accordingly.

Lady *Henrietta Harvey* died in July, 1874, and her executors now applied by summons for payment to them of the sum which had been appropriated to answer her claim.

Mr. *Southgate*, Q.C., and Mr. *Davey*, for the executors of Lady *Henrietta Harvey*:—

First, as to the freeholds. Sect. 4 of the *Dower Act* does not apply so as to deprive the testator's widow of dower; the testator has made a general devise of all his real estate, and in order that

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sect. 4 may apply the devise must be specific: *Rowland* v. *Cuthbertson* (1). Under the old law, if a testator made a devise of his real estate partly for the benefit of his widow, the devise was held to be a devise subject to dower, and the widow was entitled both to her dower and to the benefit conferred by the will: *Ellis* v. *Lewis* (2). Neither does sect. 9 of the *Dower Act* apply. The testator has given his widow an annuity payable out of a fund consisting of the proceeds of realty and personalty. Such an annuity is not an estate or interest in land within the meaning of sect. 9.

Secondly, as to the copyholds. The testator did not surrender these to the uses of his will. Under the old law a tenant of copyholds could only bar his widow's right to freebench by making a surrender. The Act of 55 Geo. 3, c. 192, provided that every disposition made by the will of a tenant of copyholds should be as valid, though no surrender should have been made to the use of the will, as if such surrender had been made. That enactment was repealed by sect. 2 of the *Wills Act*, and sect. 3, which enables a testator to devise copyholds, does not contain any such provision as to the effect of the devise as was contained in the Act of Geo. 3. Consequently the effect of the devise of copyholds is the same as it would have been under the old law where no surrender had been made to the uses of the testator's will, and Lady *Henrietta Harvey* was entitled to freebench.

Mr. *Roxburgh*, Q.C., Mr. *Chitty*, Q.C., Mr. *Romer*, Mr. *Cozens-Hardy*, and Mr. *North*, appeared for the other parties to the suit, but were not called upon.

SIR G. JESSEL, M.R.:—

I think it right to give judgment on both these points, and the more so that I certainly must respectfully dissent from some of the observations in *Rowland* v. *Cuthbertson*.

The testator by his will gives all his "real estate," except estates vested in him as trustee or mortgagee, to trustees upon trust to sell. Then he blends the proceeds of the sale with his personal estate. He directs the trustees to invest in certain ways, and then he gives his wife, out of the income of the blended trust funds, an

(1) Law Rep. 8 Eq. 466. (2) 3 Hare, 310.

annuity of £3000 a year so long as she shall continue his widow, and if she marries again, a smaller annuity. Subject to that, the property is given to the children.

The testator acquired the property and married since the *Dower Act*, and the question is whether the widow is entitled, first of all, to dower out of certain freehold estates, and, secondly, to free-bench out of copyhold estates. I will deal with the freeholds and copyholds separately.

In the first place, it is said that the *Dower Act* excludes the widow, and I am of opinion that it does. The 4th section is in these terms: "No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will." A man by his will gives all his real estate upon trust to sell—Is not that a disposition of his land? Is not that a disposition of all his lands, and therefore a disposition of any land out of which the widow would be entitled to dower? In my opinion, it is clearly so. A widow has now no estate which the husband cannot dispose of. A gift by will "of all my real estate," according to the present law, carries every interest in land over which the testator has a disposing testamentary power. A testator has power to devise land free from dower, because now the law enables him to do so. It appears to me that it is impossible, having regard to the express terms of the 4th section of the *Dower Act*, that it can be said that a general devise is not within it as much as a specific devise, and consequently I must hold that Lady *Henrietta Harvey* is barred under that section.

I make these observations, not forgetting the remarks made by my predecessor in the case which has been cited of *Rowland* v. *Cuthbertson* (1). It was immaterial to him there to decide the point, because there was a gift which clearly brought that case within the 9th section, on which I shall have a word to say presently. After reading the 4th section, His Lordship said: "I am not sure that that is conclusive on this case, because in order to dispose of the land the testator must point it out specifically, or designate it in some way." But surely a testator disposes of his lands by the gift of "all my real estate." His Lordship says you cannot dispose of land except by designating it; but will anybody doubt that a

(1) Law Rep. 8 Eq. 466.

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gift of "all my real estate" disposes of a testator's lands? I confess I am unable to accede to that view; and I think it desirable to express my opinion plainly, because that case may be cited hereafter, and may lead to difficulties similar to those which have occurred here.

I also think the 9th section applies to this case. That section begins thus: "Where a husband shall devise any land;" and in *Rowland* v. *Cuthbertson* (1) His Lordship held that the 9th section applied, although the words are "any land," the same words as in the 4th section, and the gift there was of "all his real estates." If under the 4th section a specific description is required, I do not understand why a specific description should not be required under the 9th section. It appears to me that if Lord *Romilly's* attention had been drawn to that, he would have seen—indeed his own decision shews—that the words in the 4th section being "any land," there was no reason to have it more specifically described under that section than under the 9th.

The 9th section is: "Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband unless a contrary intention shall be declared by his will."

Now, it is said or suggested that giving real estate upon trust to sell and giving the widow part of the proceeds even in the shape of a part of the capital, or of any income of the proceeds to be invested, is not a gift of an estate or interest in the land for the benefit of the widow. I am of opinion that it is. In this Court a person entitled to a share of the proceeds of the sale of land has an interest in the land itself before the sale, and therefore I consider that such a gift as this would also deprive the widow of dower out of the freehold estate.

I now come to the copyholds. Under the old law, if a man surrendered his copyhold estate to the use of his will, and then devised it, the widow did not take freebench, the effect of the surrender being to destroy her title to freebench. Then the Act of Geo. 3 was passed, which enabled a man to devise copyholds

(1) Law Rep. 8 Eq. 466.

without surrender; and under it the devise took effect as if the testator had surrendered, and therefore the widow did not take freebench. We next come to the *Wills Act*, the 3rd section of which is this: "That it shall be lawful for every person to devise, bequeath, or dispose of by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to," including copyholds. Now the testator was entitled to these copyholds; his widow had no indefeasible interest in them; therefore the case is within the very words of the Act. The Act says a testator is to be entitled to devise any real estate to which he is entitled "either at law or in equity at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all the real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same in consequence of the want of a custom to devise or surrender to the use of a will, or otherwise could not at law have been disposed of if this Act had not been made, or notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom could not have been disposed of by will according to the power contained in this Act." That means that a testator is to have the same power of devising his copyhold estate as if he had done all the things which are there mentioned—as if there had been a surrender, or as if there had been a custom, and so forth. It breaks in upon the customary law of copyholds for the purpose of giving an unlimited power of devise. I am of opinion that the same effect is to be given to a gift of copyholds under the new law as under the law as it stood before the *Wills Act*, and consequently the widow is not entitled to freebench.

Solicitors: Messrs. *Sole, Turner, & Knight;* Messrs. *Linklaters & Co.;* Messrs. *Sharpe, Parkers, & Co.*

M. R.

1874

Dec. 5.

1875

Jan. 23.

In re DRIVER'S SETTLEMENT.

Trustee of Leaseholds—Intestacy—Vesting Order—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 15, 32, 34.

Where a trustee of leaseholds has died intestate and has no legal personal representative, and a new trustee has been duly appointed in his place, the Court will not reappoint him trustee under sect. 32 of the *Trustee Act*, 1850, merely for the sake of making a vesting order under sect. 34.

Re Mundel's Trust (1) not followed.

The Court will, however, appoint an additional trustee under sect. 32, and will thereupon make a vesting order under sect. 34.

UNDER a marriage settlement made in 1852 certain leaseholds were assigned to two trustees upon certain trusts. Both these trustees had since died, and there was no legal personal representative of the survivor.

Two new trustees of the settlement had been recently appointed under a power therein contained, but it being impossible to obtain an assignment of the leaseholds or a vesting order, a petition was presented, asking that these new trustees might be re-appointed trustees by the Court, so as to give the Court jurisdiction to make a vesting order under sect. 34.

Mr. *Dundas Gardiner*, for the Petition, cited *Re Mundel's Trust*.

The MASTER OF THE ROLLS declined to follow that case.

Mr. *Gardiner* then asked leave to amend the Petition by praying for the appointment of a third trustee and for a vesting order.

The MASTER OF THE ROLLS gave leave.

1875. Jan. 23. The amended Petition came on to be heard.

The MASTER OF THE ROLLS made the order on the amended Petition as prayed.

Solicitors: Messrs. *Travers Smith & Co.*

(1) 8 W. R. 683; 6 Jur. N. S. 880

In re TEME VALLEY RAILWAY COMPANY.

FORBES' CASE.

M. R.
1875
Jan. 30.

Company—Winding-up—Director—Qualification—Contributory.

By a private Act of Parliament, which incorporated the *Companies Clauses Act*, 1845, it was enacted that *F.*, and certain other persons named, and all other persons who had already subscribed, or should thereafter subscribe, to the undertaking should be united into a company for the purposes therein mentioned; that the number of directors should be six; that the qualification of a director should be the possession in his own right of fifty shares; that *F.* and certain other persons should be the first directors of the company, and should continue in office until the first ordinary meeting, and that at that meeting the shareholders might either continue in office the directors appointed by the Act, or any of them, or might elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by the Act being, if qualified, eligible for re-election.

F. acted as a director until the first ordinary meeting, which was held in April, 1867. At that meeting he retired from office, and never afterwards had anything to do with the company. He never applied for any shares, nor were any ever allotted to him, nor was he ever placed on the register of shareholders. In May, 1874, the company was ordered to be wound up:—

Held, that *F.* must be settled on the list of contributories for fifty shares.

THE question in this case was whether Mr. *Stevenson Forbes*, one of the promoters and original directors of the *Teme Valley Railway Company*, was to be settled on the list of contributories of the company, as the holder of fifty shares, being the number the possession of which constituted the qualification of a director.

The company was incorporated by a private Act of Parliament (29 & 30 Vict. c. cccxlv.), which received the royal assent on the 6th of August, 1866. The material clauses were the following:—

Sect. 2 incorporated the *Companies Clauses Act*, 1845, and other Acts.

Sect. 4. "The Honourable *Richard Howe Brown*, *William Hyde Cooke*, *Stevenson Forbes*, Sir *Thomas Edward Winnington*, Bart., Sir *Charles Rouse Boughton*, Bart., and all other persons and corporations who have already subscribed or shall hereafter subscribe to the undertaking, and their executors, administrators, successors, and assigns respectively, shall be united into a company for the purpose

M. R. 1875 FORBES' CASE.

of making and maintaining the railway, and for other the purposes of this Act, and for those purposes shall be incorporated by the name of the '*Teme Valley Railway Company*,' and by that name shall be a body corporate with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose of lands and other property for the purposes of this Act."

Sect. 14. "The number of directors shall be six, but it shall be lawful for the company from time to time to reduce the number, provided that the number be not less than three."

Sect. 15. "The qualification of a director shall be the possession in his own right of not less than fifty shares."

Sect. 17. "The Honourable *Richard Howe Brown*, *William Hyde Cooke*, *Stevenson Forbes*, Sir *Thomas Edward Winnington*, Bart., Sir *Charles Rouse Boughton*, Bart., together with such other duly qualified shareholder as the said persons shall appoint, shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the passing of this Act. At that meeting the shareholders present in person or by proxy may either continue in office the directors appointed by this Act, or any of them, or may elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by this Act being, if qualified, eligible for re-election; and at the first ordinary meeting to be held in every year after the first ordinary meeting, the shareholders present in person or by proxy shall (subject to the power hereinbefore contained for reducing the number of directors) elect persons to supply the places of the directors then retiring from office agreeably to the provisions in the *Companies Clauses Consolidation Act*, 1845, contained; and the several persons elected at any such meeting, being neither removed, nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead in manner provided by the same Act."

Mr. *Forbes* acted as director from the passing of the Act until the first ordinary meeting, which was held on the 27th of April, 1867. He then retired from the directorship, and never afterwards had anything to do with the company. He never applied for any shares, nor were any allotted to him, nor was his name ever placed on the register of shareholders.

M. R. 1875

FORBES' CASE.

On the 23rd of May, 1874, the company was ordered to be wound up under the provisions of the *Companies Act*, 1862.

Mr. *Chitty*, Q.C., for *Forbes*:—

The other side will probably rely on *Kincaid's Case* (1); but it is submitted that that case is overruled by the decisions in *Lord Claud Hamilton's Case* (2); *Forbes' Case* (3); and *Brown's Case* (4).

If that be not so, *Kincaid's Case* is distinguishable from the present. The language of sect. 17 of the *Teme Valley Railway Act* is very different from the corresponding section of the Act upon which *Kincaid's Case* was decided, nothing being there said as to the necessity of a qualification in the original directors, in order to make them eligible for re-election. Here the original directors were only to be eligible for re-election "if qualified." That shews that the possession of a qualification was not considered necessary until the first meeting. There is no enactment compelling the original directors to take shares; and Mr. *Forbes* has entered into no contract to take any.

Further, any claim against Mr. *Forbes* is barred by the *Statute of Limitations*. Mr. *Forbes* retired from the directorship in April, 1867. The winding-up order was not made until May, 1874; and in the interval no steps were taken by the company against him, nor were any taken by him against the company in respect of these shares.

[The MASTER OF THE ROLLS:—The view of this Court is not that you have contracted to take these shares, but that you have actually taken them, though your name has not been put on the register. You are the equitable owner of the shares, and the mere omission to put you on the register has nothing to do with the *Statute of Limitations*.]

I submit that this is merely an attempt to enforce against Mr. *Forbes* an implied contract to take shares.

Mr. *Southgate*, Q.C., and Mr. *J. B. Davidson*, for the official liquidator, were not called upon.

(1) Law Rep. 11 Eq. 192.
(2) Ibid. 8 Ch. 548.
(3) Law Rep. 8 Ch. 768.
(4) Ibid. 9 Ch. 102.

M. R. 1875 FORBES' CASE.

SIR G. JESSEL, M.R.:—

The first point raised is the distinction between this case and *Kincaid's Case* (1); but as to that I am unable to follow the argument. In *Kincaid's Case* the Act provided that certain persons named "shall be the first directors of the company, and shall continue in office until the first ordinary meeting to be held after the passing of the Act; and at such meeting the shareholders present personally or by proxy may either continue in office the directors appointed by this Act, or any number of them, or may elect a new body of directors to supply the places of those not continued in office, the directors appointed by this Act being eligible as members of such new body." It appears to me that there is no distinction between that clause and the 17th section of the *Teme Valley Railway Act*, except this, that in the latter the words "if qualified" are inserted; but those words do not seem to me to have any bearing on the question. They do not shew that the original directors were not to be qualified in accordance with the 15th section, nor do they shew that they were only to possess their qualification at the first meeting in order to be eligible for re-election. In other words, the 15th section of the Act is not repealed by the 17th.

This case is therefore undistinguishable from *Kincaid's Case*, which is binding on me unless I am clearly of opinion that it is wrong, either because it is contrary to the current of authority, or to the plain words of an Act of Parliament; but I see no reason to differ from the Vice-Chancellor.

Mr. *Forbes* was one of the promoters of the *Teme Valley Railway Company*. He signed the petition to the Legislature, which resulted in the passing of the Act which incorporated the company. The Act is to a material extent his Act; it is in the nature of a conveyance to him, obtained on his representations. He is bound by the representations he made to the Legislature, and which the Legislature declares that he has made. Now sect. 4 of the Act contains a representation that *Forbes* has subscribed to the undertaking, that is, to the capital of the undertaking; and by sect. 8 of the *Companies Clauses Act*, 1845, every person who has subscribed to the capital, and whose name has been entered on

(1) Law Rep. 11 Eq. 192.

the register of shareholders, is to be deemed a shareholder of the company. Therefore, except that the formality of registration has not been complied with, *Forbes* is a shareholder; the only question is, how many shares has he subscribed for? The Act does not explicitly say how many; but I think it appears by implication. The subscription contract is not forthcoming, but as far as *Forbes* is concerned I must treat it as subsisting. It was the duty of the directors to enter the names of the subscribers to that contract on the register of shareholders for the number of shares for which they had subscribed. By sect. 15 the qualification of a director is the possession of fifty shares in his own right; and by sect. 17 the original directors were to be eligible for re-election "if qualified." I think that means "if they had not lost their qualification." I think it was their duty to be qualified from the first.

Now *Forbes* acted as a director until the first general meeting; I must consider that he has done that which it was his duty to do. I cannot allow him to say that by neglect of his own he is not on the register; if he had been on the register, he must have been on it for fifty shares.

The cases cited by Mr. *Chitty* have no application to this case. In all of them the question was, whether there was a contract to take shares or not. Here I am relieved from considering that question; the contract is recited in the Act of Parliament, passed at the instance of Mr. *Forbes*, and the only question is, how many shares has he contracted to take? That is answered by *Kincaid's Case* (1); and Mr. *Forbes* must be settled on the list of contributories as the holder of fifty shares.

Solicitors: Messrs. *Newman, Dale, & Stretton;* Messrs. *Jenkinson, Owen, & Olivers.*

(1) Law Rep. 11 Eq. 192.

M. R.
1875
Feb. 9, 10.

HARRISON *v.* MEXICAN RAILWAY COMPANY.

[1875 H. 9.]

Company—Memorandum of Association—Articles of Association—Powers of Company—Increase of Capital—Preference Shares—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 12.

If the memorandum and articles of association of a company are silent on the subject, it is an implied condition that the shareholders are entitled to rank equally as regards dividend, without preference or priority between themselves; but such implication will be rebutted if the articles of association, contemporaneous with the memorandum, contain clear provisions as to the preference or priority of classes of shares.

The memorandum of association of a company incorporated under the *Companies Act*, 1862, declared that the capital was £2,700,000, divided into 135,000 shares of £20 each. It was provided by the articles of association that the directors might, with the sanction of a special resolution of the company previously given in general meeting, increase the capital by the issue of new shares, such increase of capital to be made in such manner, to such amount, and to be with and subject to such rules, regulations, privileges, and conditions as the company in general meeting should think fit:—

Held, on demurrer, that special resolutions authorizing an increase of the capital by the issuing of preferred shares were not in excess of the powers of the company.

Hutton v. *Scarborough Cliff Hotel Company* (1) distinguished.

THE Defendants, the *Mexican Railway Company, Limited*, were a company incorporated and registered as a company limited by shares under the provisions of the *Companies Act*, 1862, for the purpose of making, maintaining, and working a railway from *Vera Cruz* to the town of *Mexico*, with a branch to *Puebla*, pursuant to certain concessions of the Mexican Government.

By the memorandum of association, dated the 19th of August, 1864, it was declared that the capital of the company was £2,700,000, divided into 135,000 shares of £20 each.

The articles of association were of even date, and contained the following clauses:—

"39. The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase

(1) 2 Dr. & Sm. 514, 521; 4 D. J. & S. 672.

its capital by the issue of new shares or stock, or may raise any further sum by the issue of bonds, such increase of capital and such further issue of bonds to be raised and made in such manner, to such amount, and to be with and subject to such rules, regulations, privileges, and conditions as the company in general meeting at the time or respective times of authorizing such creation of new shares or stocks or issue of bonds shall think fit.

"40. Any capital raised by the creation of new shares or stock, unless otherwise directed by the resolution authorizing the same, shall be considered as part of the original capital or stock, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital."

It was also provided by the articles of association (Art. 8) that in consideration of the assignment of the concession to be made to the company *Antonio Escandon*, the concessionaire, his executors, administrators, and assigns, should be entitled to receive and should be paid in perpetuity 4 per cent. of the net profits of the company in each year, after payment of all charges and expenses whatsoever, and after payment of a dividend to the shareholders of 8 per cent. per annum; (Art. 12) that the directors should have power to borrow for the purposes of the company the sum of £2,700,000, and such sum should be raised by the issue of bonds or obligations under the seal of the company, each bond to be of such value as might be determined by the directors for the time being, and to be issued under such conditions and upon such terms as the directors might think fit; (Art. 13) that all interest or dividends which should be declared on the shares of the company should be paid half-yearly in *London*, *Paris*, and *Mexico*, as most convenient to the shareholders; (Art. 36) that the directors might convert paid-up shares into stock; (Art. 38) that the several holders of stock should be entitled to participate in the dividends and profits of the company, according to the amount of their respective interests in such stock; and such interests should, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as

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would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in dividends, should be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred the like privileges and advantages; (Art. 69) that in addition to the sum of £250 per annum each director should also be entitled to receive, as further remuneration for his services, 4 per cent. of the net profits of the company which should remain after a deduction made for the expenses of the company and for the reserve fund thereinafter mentioned, and for the payment of the 4 per cent. payable to *Escandon*, and for interest on the shares of the company to the extent of 8 per cent. per annum; (Art. 82) that during the construction of the different sections of the railway the produce of the sections opened should be applied in payment of the general expenses of the railway, the interest on the company's bonds, and interest on the shares issued to the extent of 8 per cent.; the deficiency, if any, to be made up out of capital; (Art. 83) that after payment of all the costs and expenses of the railway, and payment of the percentage on profits payable to *Escandon*, and the percentage payable to the directors and the 8 per cent. interest on the shares issued by the company, the directors, before recommending any further interest or dividend to be paid to the shareholders, should appropriate 4 per cent. of the remaining profits as a reserved fund to meet contingencies.

The whole of the original share capital of the company, with the exception of about £250,000, was issued, and the shares which were issued had been fully paid up.

In the course of the construction of the railways the company expended sums in excess of its share capital, and agreed to issue 8 per cent. bonds in satisfaction of the claims of its creditors.

Such bonds, however, were not issued, but special resolutions were passed for the issue of preferred shares in lieu thereof at an extraordinary general meeting of the company held on the 11th of November, 1874, and were confirmed at a second extraordinary general meeting held on the 1st of December.

Such special resolutions were as follows:—

"1. That the capital of the company shall be, and hereby is, increased by the addition of so much of the sum of £2,600,000 in

preferred shares of £20 each as shall (with the previous consent of the Mexican Government) be issued by the board of directors to, and taken by creditors of the company as fully paid-up shares in lieu or satisfaction of an equal amount of principal moneys owing or which may be owing by the company on bonds bearing interest at the rate of 8 per cent. per annum, agreed to be issued in satisfaction of the claims of its creditors. And that in the division of the net profits of the company accrued in respect of any half year no dividend shall be paid in respect of any share of the original capital until the holders of the preferred shares issued in pursuance of this resolution shall have received a dividend at the rate of 8 per cent. per annum on the nominal amounts of their said shares in respect of that half year. And that after the holders of the said preferred shares shall have received a dividend in respect of any half year at the rate of 8 per cent. per annum on the amounts of their shares, no further dividend shall be paid to them on those shares in respect of that half year, and no deficiency of dividend to either class of shareholders in respect of any one half year shall be made good out of any excess of profits in respect of any other half year. And further, that in case any surplus of the capital assets of the company is to be returned to shareholders upon the winding-up of the company, or otherwise, the holders of the preferred shares to be issued in pursuance of this resolution shall be entitled to have the full nominal amount of their said shares returned to them before any return of capital is made in respect of any shares of the original capital of the company."

"2. That the capital of the company shall be, and is hereby, increased by the addition thereto of so much of the sum of £1,200,000 in preferred shares of £20 each as shall be issued by the board of directors to, and taken by creditors of the company in satisfaction of, an equal amount of the moneys owing by the company to them for interest accrued before the year 1874. And that in the division of the net profits of the company accrued in respect of any half year no dividend shall be paid in respect of any share of the original capital of the company until the holders of the preferred shares issued in pursuance of this resolution shall have received a dividend at the rate of 6 per cent. per annum on the nominal amounts of their shares in respect of that half year.

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And that after the last-mentioned dividend has been paid no further dividend shall be paid in respect of the said preferred shares out of the profits of that half year, and no deficiency of dividend to either class of shareholders, in respect of any one half year, shall be made good out of any excess of profits out of any other half year."

"3. In the division of the net profits of the company accrued in respect of any half year no dividend shall be paid in respect of any preferred share, which in pursuance of a special resolution (marked 2), passed on the day of passing this resolution, shall be issued to, and taken by, a creditor of the company in satisfaction of an equal amount of interest owing to him by the company, until the holders of the preferred shares, which in pursuance of a special resolution (marked 1), also passed on the day of the passing of this resolution, may be issued to, and taken by, creditors of the company in lieu of bonds, shall have received a dividend at the rate of 8 per cent. per annum in respect of that half year."

The bill was filed on the 13th of January, 1875, by *George Sydney Harrison*, on behalf of himself and all other the holders of shares in the original capital of the company, except the Defendants, against the company and the directors. It contained statements to the foregoing effect, and alleged that the directors had applied for and expected to obtain the consent of the Mexican Government to the issue of preferred shares pursuant to the resolutions, and that acting under colour of the resolutions, they threatened and intended to issue to the creditors of the company (who were willing to accept the same) new shares of the company in discharge and satisfaction of the amounts due to such creditors, for principal and interest, and to attach to such shares a preferential dividend of 8 per cent., in priority to the holders of the original share capital, and also (as respects the new shares to be issued in satisfaction of the principal moneys due to such creditors) a right, in case any surplus of the assets of the company was to be returned to shareholders upon the winding-up of the company or otherwise, to have the full nominal amount of the said new or preferred shares returned before any return of capital was made to the holders of the original shares.

The bill charged that such issue of preferred shares was

not authorized by anything contained in the memorandum or articles of association, and was in excess of the power of the company; and that even if the special resolutions could operate as an alteration of the articles of association so as to confer on the company power to issue preferred shares, such an alteration would be inconsistent with the fundamental constitution of the company; and prayed that it might be declared that the increase of the capital of the company by the issue of such preferred shares was in excess of the powers of the company, and that the Defendants might be restrained from creating any shares purporting to be preferred shares of the company, pursuant to the special resolutions.

The company demurred to the bill.

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for the demurrer:—

The question is, whether the articles of association authorize the increase of the capital by the issue of preferred shares in pursuance of the special resolutions. *Hutton* v. *Scarborough Cliff Hotel Company* (1), which will be relied on as an authority for the bill, and *Melhado* v. *Hamilton* (2), are distinguishable. In each of these cases a power to increase the capital by the issue of shares, on such conditions as the company should determine, was held not to authorize the issue of preferred shares. But in the present case there is power to increase the capital by the issue of new shares, "with and subject to such rules, regulations, privileges, and conditions" as the company shall direct. It is submitted that a preferential right to dividends is a privilege within the meaning of article 39, and that the demurrer must be allowed.

Mr. *Fischer*, Q.C., and Mr. *Davey*, in support of the bill:—

The constitution of a company incorporated under the provisions of the *Companies Act*, 1862, is contained in the memorandum of association, and cannot be qualified by inconsistent expressions occurring in the articles in the face of the prohibition against alteration occurring in sect. 12 of that Act: *In re Financial Corporation* (3). It is part of the constitution of such a company, in the

(1) 2 Dr. & Sm. 521. (2) 21 W. R. 619, 874.
(3) Law Rep. 2 Ch. 714.

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absence of a stipulation to the contrary, that the shareholders shall participate equally in the profits. To create a new class of shareholders with a preference in respect of dividends over the original shareholders would be an essential alteration of the constitution, and not a mere matter of internal regulation: *Bryon* v. *Metropolitan Saloon Omnibus Company* (1); *Hutton* v. *Scarborough Cliff Hotel Company* (2); *Melhado* v. *Hamilton* (3). It is submitted, therefore, that the proposed increase of capital by the issuing of new shares with a preference dividend is in excess of the powers of the company. It has been argued that this is not the case, because of the ambiguous word "privileges" occurring in art. 39; but whatever might be the meaning of the word standing alone, it is controlled here by the context, it being clear from articles 8, 13, 38, 69, 82, 83 that the intention of the parties to the contract was that all the shareholders alike should, if possible, receive 8 per cent. on their shares.

SIR G. JESSEL, M.R.:—

The first question to be decided is, what is the law on this subject? I am bound by the decisions in *Hutton* v. *Scarborough Cliff Hotel Company* (4), not only by the decision of Lord Chancellor *Westbury*, but also by the decision of Vice-Chancellor *Kindersley*, although that is a decision of a Court of co-ordinate jurisdiction. It is not a recent decision, and it is not one that I can take upon myself to pronounce to be erroneous. I mention those decisions as binding upon me, because I desire to abstain from expressing any opinion of my own as to the correctness of either of those decisions.

It has been admitted that the effect of the second decision of Vice-Chancellor *Kindersley*, in *Hutton* v. *Scarborough Cliff Hotel Company*, is no more than this, that the 12th section of the *Companies Act*, 1862, prohibits any alteration of the conditions of the memorandum of association, whether such conditions are expressed or implied; and if the memorandum of association is silent upon the subject of the terms of the original contract under

(1) 3 De G. & J. 123. (3) 21 W. R. 619, 874.
(2) 2 Dr. & Sm. 521. (4) 2 Dr. & Sm. 514, 521; 4 D. J. & S. 672.

which the company was formed, then there is an implied condition that all the holders of shares are entitled to rank equally as regards dividend, without any preference or priority between themselves; but if it does clearly appear upon the articles of association that that was not the meaning of the original contract, then there is no such implication of law as to the meaning of the memorandum of association, that implication being rebutted by the clear terms of the contemporaneous instrument. It was asserted that the intention to confer a priority must clearly appear by the articles of association. But that argument does not carry the case any further, because if the true construction of an instrument is once discovered by ordinary rules of interpretation, then that construction does clearly appear upon the written instrument, that is, with sufficient clearness for the Court to act upon it. So that, after all, the real question to be decided is, whether or not, according to the true construction of these articles, the company has or has not power to issue shares to which a preferential dividend shall be attached.

The formation of the company is peculiar. The memorandum of association is silent upon the point; it simply gives the number of the original shares, and there it stops. The articles of association clearly contemplate an increase of capital, and the question is, upon what terms that capital can be increased. It is to be observed that in the construction of these articles we must not pay too much attention to the technical meaning of some of the terms used. Some of those terms are used indifferently, either in a popular sense, or a technical sense. The first article to which attention has been drawn, and which it is necessary to discuss, is the 8th, by which *Escandon* is to be "entitled to receive, and shall be paid in perpetuity, 4 per cent. of the net profits of the company in each year, after payment of all charges and expenses whatsoever, and after payment of a dividend to the shareholders of 8 per cent. per annum." The word there used is "dividend," and I think that is the correct word to use, when you find afterwards out of what fund the 8 per cent. is to be paid. The next article is the 13th, and there the draftsman departs from the ordinary use of technical language, and begins in this way: "All interest or dividends which shall be declared on the shares of the company shall be payable

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half-yearly in *London*, *Paris*, and *Mexico*." Now, strictly speaking, interest is not payable upon the shares of the company, though dividends are, being dividends payable out of net profits. But there he varies his language from "dividends" to "interest or dividends." Then we come to the 38th article. There is a previous article which provides that shares may be converted into stock. The stockholders are to have "the same privileges and advantages, for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company, but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages." There is an observation to be made upon that article, that whatever meaning the word "privileges" may have, standing *per se*, it does in that article include participation in dividends and profits, or, to speak more accurately, the right so to participate.

[His Honour then read the 39th article, and continued:—]

Words of larger import could hardly be imagined. Yet it is said that the language is not sufficient to convey the power to authorize the shares which are issued for the purpose of increasing the capital to be issued with the privilege of having attached to them a preferential dividend. The capital is to be raised or to be increased "in such manner, and with and subject to such rules, regulations, privileges, and conditions," as the company may think fit. I can find no such limit either in the term "privilege" or in the term "condition" as has been suggested. It seems to me that they are words of extensive meaning, and fully ample to cover all that is proposed to be done. I should say, had I not heard a long argument upon the subject, that they are words free from ambiguity and do not raise any doubt as to their meaning. I think that there is no limit to the privilege that may be attached to the shares by the general meeting, so far as regards participation in dividends, or any other right whatever.

But then it is suggested that some other clauses control it. The 40th article appears to me to support the construction I have mentioned of the preceding article, if it required any support

whatever, which I do not think it does. It excepts what is "otherwise directed in the resolution authorizing the same;" that is, it implies that the resolution authorizing the same may direct that the shares so issued shall be treated in a manner altogether different from the manner in which they would be treated if they were considered as part of the original capital. The argument in support of the bill is, that there is no power to issue shares that shall not carry an equal right with the original shares to participation in dividends.

Another clause that I have been referred to is the 69th, where the word used is "interest." But, having traced the history of this term throughout the articles, I cannot accede to the argument that the 8 per cent. is other than a dividend. The 82nd article is limited to the period of construction of the line, and there the word, no doubt, is "interest." The 83rd article also has the word "interest." The thing is, as I said before, correctly described as a dividend, because you pay your expenses before you get to the payment of 8 per cent. In other words, the result of the articles is this, that you do not pay more than 8 per cent. in the shape of dividend to the shareholders until you have set aside a reserve fund of 4 per cent., and have obtained the sanction of a general meeting to such further distribution of profits.

Those are all the articles to which my attention has been drawn; and I think it does fairly and clearly appear from them that there is no limit to the power of the company to issue new shares with a preference dividend. But there is one observation upon the 39th article that occurred to me during the argument. The power is not confined to an increase of capital by the issuing of new shares and stock, it extends to the raising of money by bonds. Now the interest to be paid upon such bonds would precede the dividend upon the shares, and it appears to me that that shews strongly that the meaning of the draftsman was, that the company might attach a preferential payment to anything issued under the 39th article, whether bonds or shares.

But the peculiarity of the case does not quite stop there, for, having agreed to issue the 8 per cent. bonds, the company now propose to issue these new preference shares bearing the same rate of interest to the bond-holders; so that, instead of derogating

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from the rights of the original shareholders, they are in fact assisting them. In other words, instead of having the right to demand both principal and interest before the other shareholders can get anything, to the imminent danger of destroying the company, the creditors are now restricted to a demand for interest only, and that only if the revenue of the company is sufficient to pay it. It is plain, therefore, that what is proposed to be done does not in any shape or way derogate from the original right of the shareholders.

Taking the whole matter into consideration, I have arrived at the conclusion that what is proposed to be done is proper to be done, and therefore I shall allow the demurrer.

Then comes the question of costs. I must say, if contracts are drawn in the way this contract has been drawn, I cannot be surprised at persons not thoroughly understanding their meaning at first sight; and I do not think that the directors, in a case of this kind, ought to complain of the result if, as I intend, I make no order as to costs.

Solicitors for the Plaintiff: Messrs. *Randall & Angier.*
Solicitors for the Defendants: Messrs. *Freshfields & Williams.*

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1875
Feb. 19.

[1870 S. 250.]

Wife's Property—Reduction into Possession.

A woman having a sum of money deposited with a merchant, and standing in her name, married a man whom she afterwards accompanied on a voyage, and both were drowned at the same time. The money was transferred by the merchant into the names of the husband and wife; but the only direction given to the merchant by the husband was to keep this property separate from his other moneys. The husband by his will, after reciting that his wife had previously to her marriage deposited with the merchant this money, which was standing in her name, disposed of the property as his own:—

Held, that the husband had done no act to reduce the wife's money into possession, and that it would go to her personal representatives.

PETITION.

The Petition stated that *Catherine Ewin*, the widow of a captain of a merchant vessel, had become possessed of his property on his death to the amount of £752, which was deposited in the hands of Messrs. *Scrutton & Co.*, shipbrokers. *Catherine Ewin* afterwards married *Augustus Edward Morris*, also the captain of a merchant vessel, belonging to Messrs. *Scrutton, Sons, & Co.*

In March, 1866, *A. E. Morris* made his will, and on the 14th of November, 1866, he executed the following codicil to his will:—

"Whereas my wife previous to her marriage with me deposited with Messrs. *Scrutton, Sons, & Co.* the sum of £750, which said sum is now standing in the name of my said wife, now I do hereby in the event of myself and my wife dying about the same time give and bequeath the said sum, or any other sum of money that may be standing in the name of my said wife with Messrs. *Scrutton, Sons, & Co.*, or any other person or persons, in manner following, that is to say: the sum of £100 part thereof to *William* and *Catherine Pattillo*, the father and mother of my said wife, or to the survivor of them; the remainder to and between the children of *James* and *Margaret Pattillo*, to and between the children of *Thomas* and *Elizabeth MacIntire*, to *James Black*, and to *Robert Black*, or to the survivor or survivors of them, in equal shares."

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In the beginning of the year 1868 *Catherine Morris* accompanied her husband Captain *Morris* on a voyage in the ship *Joseph Hume*, which was run down by another vessel in May, 1868, and foundered, and both Captain *Morris* and his wife were drowned at the same time.

It appeared that after the death of Mrs. *Morris's* first husband the above sum of £752 was transferred into her name in the books of Messrs. *Scrutton & Co.*, and when she married the testator it was still standing in her name in the said books, but the money was subsequently transferred to an account headed "Captain and Mrs. *Morris*."

The Petitioner was the personal representative of Mrs. *Morris*, and the Petition prayed that the £752 so standing in the books of Messrs. *Scrutton & Co.* might be paid over to him.

The question now raised was, whether the £752 properly belonged to Captain *Morris* at the time of his death, or whether it remained the property of his wife and passed to her legal personal representatives.

Mr. *Thomas Scrutton*, of the firm of *Scrutton, Sons, & Co.*, stated in an affidavit, that Captain *Morris* had given directions to the firm to keep this money separate and distinct from his other property in their hands. The witness could recollect no other directions given by the testator as to the money.

It was also in evidence that both Captain and Mrs. *Morris* had drawn drafts upon this fund which had been honoured by the merchants.

Mr. *J. Pearson*, Q.C., and Mr. *E. Robertson*, in support of the Petition:—

It is admitted by all parties in this case that it cannot be ascertained which of the two persons, Captain *Morris* or his wife, *Catherine Morris*, died first; therefore the question is, whether Captain *Morris* had reduced into possession this sum of £752, which was his wife's property when he married her. By the codicil to his will he disposed of the money, and provided for the event which happened—that of the two dying at the same time; but this is no proof that he had done any act to reduce it into possession. At the date of the codicil the money was standing in the

books of Messrs. *Scrutton & Co.* to an account headed "Captain and Mrs. *Morris*," and there is the evidence of *Thomas Scrutton* that Captain *Morris* directed them to keep this money separate and distinct from his other property in their hands. It is submitted that his direction to keep the money separate is evidence that he did not intend to exercise any act of ownership over it. There is no evidence that it was directed to be placed in the joint names of the husband and wife, this must have been done in a purely voluntary manner by Messrs. *Scrutton & Co.* *Primâ facie*, then, the money was the property of the wife, and we seek to have it paid over to her representatives; the burthen, therefore, rests on the husband's representatives to shew that he ever reduced it into possession.

Mr. *Glasse*, Q.C., and Mr. *J. Cutler*, for the administrator of Captain *Morris*:—

The testator by the codicil to his will assumed to dispose of this property, and we, therefore, say that the burden of shewing it was not his rests with the representatives of the wife. There is evidence that the testator directed the money to be kept separate and distinct, and the fact that after the marriage the money was transferred to a new account by the firm, and placed in the names of Captain and Mrs. *Morris*, shews that Captain *Morris* exercised a control over it, and must have believed that he had done all that was necessary to make the property his. He would not otherwise have disposed of it by the codicil to his will. The fact of his drawing out a portion of the money is also sufficient to cause a reduction into possession of the whole fund.

[As to the onus of proof they cited *Wing* v. *Angrave* (1); *In re Lewes' Trusts* (2); *In re Phene's Trusts* (3); *Underwood* v. *Wing* (4).

Mr. *Whitehorne*, for Messrs. *Scrutton & Co.*

Mr. *W. F. Robinson*, for other parties.

(1) 8 H. L. C. 183.
(2) Law Rep. 11 Eq. 236; 1bid. 6 Ch. 356.
(3) Law Rep. 5 Ch. 139.
(4) 4 D. M. & G. 633.

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SIR R. MALINS, V.C.:—

The circumstances of this case are rather peculiar. It appears that Captain *Ewin*, the captain of a merchant ship, died in 1865, and his widow became possessed of his property, amounting to £752, which was at the time of Captain *Ewin's* death deposited with the firm of *Scrutton & Co.*, who were the owners of the ship of which he was captain; and after his death the money was transferred into the name of his widow, and was standing to an account headed with her name on the 28th of February, 1866. The widow afterwards married Captain *Augustus Edward Morris*, who was also the captain of a ship owned by Messrs. *Scrutton & Co.*, and she went with her husband on a voyage. The ship in which they sailed was run into by another vessel, and it foundered, and both the husband and wife were drowned. Now if anything had been done by Captain *Morris* by which he had exercised an ownership over the fund in question, then the money would have been reduced into possession by him, and being reduced into possession, then it is clear that those persons claiming under him would be entitled to the money, and so also the money would belong to his representatives if Captain *Morris* had survived his wife, but as they both died under the circumstances I have stated, it is impossible to prove which of them died first. For the purpose of shewing that the husband had a right to dispose of his wife's property, you must either prove that she died before him or that he reduced the property into possession during his life. And for this purpose conjecture will not do, you must have proof of the fact. What then is the proof? It appears that about a month before the marriage this sum of £752 ceased to stand in the books of the firm to the credit of the wife, for I find upon examining the books of the firm, which are kept in the usual correct style of merchants in general, that the money is entered on a page to which there is no heading, but in the corner I observe that the words Captain and Mrs. *Morris* are written in pencil. The conclusion I draw from this is, that Messrs. *Scrutton & Co.* knew the money had belonged to Mrs. *Morris's* first husband, and that it then belonged to her, but they did not exactly know in what name it was then to be entered, consequently until they had some information upon the subject they entered it in blank and wrote

in the corner the names of Captain and Mrs. *Morris* to indicate to whom it belonged. Then the account is subsequently transferred to another book, and there we find it entered under the heading Captain and Mrs. *Morris*, which leads me to believe that the clerk who entered the account, seeing those names in pencil, thought he was doing right in entering the amount to the credit of Captain and Mrs. *Morris*, and did so without any authority upon the subject. But to prove that the property was reduced into possession by Captain *Morris* it must be shewn that this was done by his express direction. There must be positive proof whether it was done by his direction or not. It appears that both Captain *Morris* and his wife drew upon this fund. Mrs. *Morris* wrote a letter to the firm requesting them to pay a sum of money to her parents, and this letter was honoured, in so far that the firm, knowing that the money had belonged to Mrs. *Morris*, made no objection to the payment of a sum of money out of it to the person named in the letter. In other words, they honoured her cheque. But not only did Mrs. *Morris* draw upon the fund, but Captain *Morris* also drew upon it. I put this question during the argument, suppose a wife upon her marriage is possessed of a sum of £1000, and her husband draws out £100, portion of his wife's property, does that prove that he reduced into possession the remaining £900? I am clearly of opinion that it does not. If there is a large sum belonging to the wife, and part of it is dealt with by the husband either by drawing cheques upon it or otherwise, all that he does not deal with remains in the possession of the wife. If there was clear evidence that Captain *Morris* intended to reduce this property into possession then there could be no question that those persons who claimed under him would be entitled, but what is the evidence? There is an affidavit made by Mr. *Thomas Scrutton*, one of the firm, in which he says that he does not remember whether Captain *Morris* or his wife ever gave any special instructions as to how this sum was to be dealt with, except that Captain *Morris* directed it should be kept separate and distinct in the books of the firm from the rest of the money belonging to him; the meaning of this probably was, that knowing it to have been his wife's he did not wish it mixed up with his own accounts, but this is no evidence to shew that he ever

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dealt with the property as his own or intended to reduce it into possession.

There is no further evidence to prove the case, and under these circumstances my opinion is that the persons claiming under Captain *Morris's* will have no right to the fund, and it must go to the legal personal representatives of the wife.

Strictly speaking, the costs would follow the result and the losing party would have to pay the costs, but as the question is a fair question to raise, and the parties not objecting, I think all the parties to this petition should have their costs out of the fund.

Solicitors for the Plaintiff: Messrs. *Pitman & Lane.*

Solicitors for the Defendants: Messrs. *Nash, Field, & Mathews.*

HEALEY *v.* CORPORATION OF BATLEY.

V.-C. B.

1875

[1872 H. 213.]

Jan. 16, 19, 20, 22; *Feb.* 10.

Public Right of Way—Dedication—User—Interruptions—Street—"Highway repairable by the Inhabitants at large"—General Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 23, 62—*Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 69—*Public Health Act* (1848) *Amendment Act*, 1852 (15 & 16 *Vict. c.* 42), *s.* 13.

In January, 1850, the owner in fee of a plot of land near a town demised the coals under it for six years, to *K.*, the owner in fee of the adjoining land; and in the lease was an agreement that a street, to be called *Union Street*, should within five years be made across the land under which the coal lay and *K.'s* land; that a sewer should be made under such road; that the lessor and lessee should, at their own cost, construct and repair so much of the said road and sewer as should extend along their respective lands; and that the road should be used as a public road for all purposes for ever thereafter, and should be maintained by each of the parties so far as the same should extend over his land, until the same should be adopted by the surveyor of highways. The road and sewer were never made, and there was no dedication of a highway to the public by notice under the *Highway Act*. A brickfield, and afterwards (in 1851) a colliery, were opened on *K.'s* land, and gaps were opened through which access was obtained to the premises for carts and foot-passengers. In 1869 posts and chains were placed across one of the openings, but after a few months the chains were removed. In 1870 *K.'s* land was sold, and in 1871 conveyed to the Plaintiff in fee, and in 1872 the Local Board of Health called upon him to sewer and pave the alleged street under the *Public Health Act*, 1848:—

Held, that the agreement in the expired lease had been abandoned and could not be enforced; and that it did not amount to a dedication of a right of way to the public.

Circumstances which will be held to amount to an interruption sufficient to prevent a public right of way being acquired by user.

Public highways are generally repairable by the public: and an owner of land in the suburb of a town who allows the public to pass over his land, but who does not make a road at his own expense, nor propose to dedicate a highway to the public by notice under the *Highway Act*, nor undertake to keep the road in repair for twelve months with a view of throwing the future care and expense of the highway on the surveyor and the general rate under the same Act, is not liable to be compelled to sewer and pave the road as a street under the 69th section of the *Public Health Act*, 1848.

MOTION for decree.

On the 6th of May, 1872, the Corporation of *Batley*, *Yorkshire*, acting as a Local Board of Health, issued a notice under the

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69th section of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), signed by *Thomas Dean*, Town Clerk and Clerk to the Local Board, addressed to *Joseph Healey*, as "the owner of certain premises fronting, adjoining, or abutting upon a certain street called *Union Street*," within the borough, giving him notice to "sewer, level, pave, flag, and channel the same" within six weeks from the date, in a manner which the notice proceeded particularly to specify, "to the satisfaction of the Local Board or their surveyor."

In answer, Mr. *Healey's* solicitors wrote on the 14th of July, stating that he was prepared to contest the right of any one to use the road, and refused to put himself to the cost of paving and sewering that which he considered to be his own private property. They said they should be glad to hear as to the grounds upon which it was contended that the property was a street which Mr. *Healey* was liable to repair.

A correspondence followed; and on the 29th of August, the Corporation entered upon and took possession of that part of the Plaintiff's premises which they alleged to be *Union Street*, and were proceeding to remove the soil.

The bill was filed on the 2nd of September, 1872, by *Joseph Healey* against the Corporation and *Thomas Dean*, and an interim order for an injunction was made on the same day. The Defendants filed their answer on the 5th of November, 1872, and on the 21st of November the order for injunction was ordered to stand to the hearing of the cause.

From the bill and answer the following state of facts appeared:—

The plot of land in question, hereafter referred to as "the Plaintiff's premises," comprised about 1A. 1R. 18P., situate at *Clark Green*, near *Batley*, and had on it a mill, workshops, and engine-house, where the Plaintiff carried on his business of a mungo and shoddy manufacturer.

In about 1847, the Plaintiff's premises, together with other land on the east side of the same, and situate between them and *Wellington Street* and *New Street*, belonged to one *Godfrey Higgins* who in about 1848 sold the Plaintiff's premises to *Matthew Kaye*. The Plaintiff's premises consisted of a four-sided piece of land, then a grass field, bounded on the south and east sides by a stone wall, and on the north and west by a quick fence. The southern bound-

ary, which ran obliquely downwards in an acute angle towards the south-west, abutted on the *Clark Green Road*. Along the eastern boundary was a public right of way.

In about 1850, *Matthew Kaye* turned the Plaintiff's premises into a brickfield.

Shortly before 1850, *Godfrey Higgins* sold the land to the east of the Plaintiff's premises to *Henry Ackroyd* in fee simple, and before the conveyance was executed, by a deed dated the 1st of January, 1850, and made between *Higgins* of the first part, *Ackroyd* of the second part, and *Kaye* of the third part, *Higgins* and *Ackroyd* demised to *Kaye*, for a term of six years from the date of the deed, two seams of coal under the land so purchased by *H. Ackroyd*, and the deed contained a covenant in the following terms:—

"Lastly, it is hereby agreed that a street or road of ten yards in width, to be called '*Union Street*,' shall, within five years from the date hereof, be formed and opened over and along the said close called *Chamber Lane Ing*, and over and along a close adjoining thereto called *Orn Hill Close*, purchased by the said *Matthew Kaye* from the said *Godfrey Higgins*, and that a sewer shall be made under such road, the bottom of which shall be six feet below the surface of the ground, and such sewer shall be twenty inches in width and two feet in height for the whole length of the said road, and that each of them the said *Godfrey Higgins* and *Matthew Kaye* shall at his own costs form, construct, and repair so much of the said road and sewer as shall extend along the respective lands belonging to him; and that the said road shall be used as a public road for all purposes whatsoever for ever hereafter, and shall be maintained by each of them the said parties, so far as the same may extend over the land belonging to him, until the same shall be taken and adopted by the surveyors of the highways of *Batley* aforesaid."

The site of the proposed *Union Street* was a strip of land running from the eastern boundary of the Plaintiff's premises to *Clark Green Road* across the southerly portion of the Plaintiff's premises, and dividing it into two unequal parts.

The answer stated that "in pursuance of the agreement" above mentioned, "the sewer which it was thereby agreed should be

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made under the said road was, before the year 1854, partly constructed thereunder;" and that "in further pursuance of the said agreement, a street or road was in or about the year 1854 formed over the Plaintiff's premises and the premises adjoining them on the east side, running in the direction hereinbefore in that behalf mentioned to the junction of the said two streets, *New Street* and *Wellington Street*, where it ended and now ends. This street, after having been formed, was called *Union Street*, and was thrown open to be used by the public."

The above statement was, however, denied; and the result of the evidence was held to be that the making of the sewer and road was never commenced.

No dedication to the public by notice, as prescribed by the 23rd section of the *General Highway Act*, 1835 (5 & 6 Will. 4, c. 50), of any road across the Plaintiff's premises was ever made.

In 1851 *William Kaye* began mining for coal. In that year two shafts for mining were sunk on the Plaintiff's premises; a blacksmith's shop was erected, and the getting of coal commenced. Gradually the ground rose round the pit-shaft, and formed a hill of coal refuse or slack. This pit hill covered a great portion of the field, and was entirely over the site of the so-called *Union Street*, except at one portion where there was a pond of water in a hole from which brick earth had been got.

The bill stated that in 1862 (but one of the witnesses said in 1856), for the convenience of a customer of *William Kaye*, who was purchasing coal, a gap was made in the eastern stone wall; and that subsequently (but as one of the witnesses said, in 1854) a gap was made in the southern wall, originally to get in a large boiler, wide enough to let a cart through. This latter opening was for a time guarded by a gate with a lock. Subsequently, the slack forming the pit hill having been removed, and the two breaches being left open, a few persons got into the habit of passing through, and occasionally a horse and cart passed through.

Several witnesses for the Plaintiff deposed to having been, about the year 1861, turned back and warned off by *Henry Ackroyd* and others.

Matthew Kaye died; and the answer stated that the trustees of his will, prior to selling the Plaintiff's premises to *John William*

Akeroyd, as after mentioned, "built a wall along the northern side of the said road or street called *Union Street*, in order to fence it off from that portion of the premises which had been previously worked as a colliery; and before selling the Plaintiff's premises to the said Mr. *J. W. Akeroyd*, they caused a ground plan of the premises to be prepared for production to intending purchasers of the premises, and on this plan the said road called *Union Street* was distinctly marked, and was described as 'Road ten yards wide.' The said plan also contained a suggestion for the alteration of the course of the said road in manner shewn on the said plan. We believe that this plan was produced to and inspected by Mr. *J. W. Akeroyd* and his solicitors, before the said Mr. *J. W. Akeroyd* bought the Plaintiff's premises."

As to this wall, the bill stated that, prior to the Plaintiff being the owner, and whilst he was only a tenant of part of the premises, a wall was built "partly" along the site of the way which had been illegally made use of as above mentioned, and the south-eastern corner of the Plaintiff's premises was made into a yard; and that the Plaintiff placed a post and rail across the southern entrance of the yard so as to separate it from the *Clark Green Road*.

On the 7th of August, 1867, *Matthew Kaye's* devisees in trust and mortgagees made an attempt to sell the property; and failing, they again, on the 28th of May, 1869, attempted to sell it in two lots, and on this occasion a sale-plan was prepared shewing a road across the property which would have to be formed in order to give access to the two lots. At this sale both lots (the colliery having been exhausted) were sold to *J. W. Akeroyd*, who in 1869 entered into possession. He caused posts and chains to be placed across the gap on the eastern side.

In 1870 *J. W. Akeroyd* contracted to sell the Plaintiff's premises to the Plaintiff, and the Plaintiff in that year went into possession.

The bill stated that some time after the Plaintiff came into possession he took down the chains which *J. W. Akeroyd* had put up, to let some timber through, but the posts still remained.

As to this, the answer stated that *Union Street* had been "used by the public as a public way ever since the year 1854, with the

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exception only of a few weeks in the year 1870, when the said Mr. *J. W. Akeroyd* attempted to prevent its being so used, and for that purpose placed chains across the road at the point at which it touched what are now the Plaintiff's premises. On his placing them there, he was required by Mr. *Henry Ackroyd*, the owner of the adjoining property, to remove them, and they were in consequence removed by the Plaintiff, after he had agreed to buy the said premises. The said chains did not remain across the said road for more than three or four weeks."

By the conveyance to the Plaintiff dated the 12th of July, 1871, the assurance was made "subject to any subsisting rights of way and other easements."

Shortly before the filing of the bill, the post and rail placed by the Plaintiff so as to separate the yard from *Clark Green Road* had been removed; he did not know by whom.

The bill alleged that the right of way which was referred to and reserved in the indenture of the 12th of July, 1871, was the above-mentioned right of way which ran along the eastern boundary of his premises; that the site of the so-called *Union Street* was an imaginary slip of land running somewhere about where persons had trespassed for their temporary convenience as above-mentioned; that no such lease as that of the 1st of January, 1850, or any reference thereto, formed any portion of the muniments of title disclosed to him when he became the purchaser of the premises; and affirmed, as a matter of fact, that no such road had been made. He charged that, even if the lease were a valid and subsisting document, which he did not admit, the parties thereto had long since waived and abandoned their rights.

The bill prayed for an injunction to restrain the Corporation of *Batley* "from continuing in possession of the Plaintiff's premises, or any part thereof, and from digging, removing, or in any way interfering with the same, or the soil thereof, or any part thereof, and from making or forming, or proceeding to make or form, any road, street, or way, upon or across the Plaintiff's premises; from taking any steps or proceedings of any nature or kind whatsoever with a view to enforce the said notice of the 6th of May, 1872, or the payment of any moneys thereunder or by reason thereof."

The Defendants, by their answer, alleged that the rights of way

reserved in the conveyance to the Plaintiff referred not only to the eastern boundary footpath, but also to *Union Street;* that *Union Street* was a road which for more than eighteen years had been used as a public way, not merely to fetch coals, but for general purposes, notwithstanding the heap of coal, refuse, or slack, round or near which there was always a clear space for carts and foot passengers; that from the time when the chains were so removed until a short time before the institution of the suit, the right of the public to use *Union Street* as a public road had never been disputed; that it was now being so used; and that it would be more generally used if it were put into a proper state of repair, but that it never had been properly repaired.

Finally, they submitted that the road was a street within the meaning of the *Public Health Act,* 1848, and that as the same had not been sewered and paved (following the language of the 69th section) to the satisfaction of the Corporation as such Local Board of Health, the Defendants were authorized as such Local Board to require the Plaintiff to execute the works specified in the notice, or upon his default to execute such works at his expense.

The questions were, whether the public had acquired a right of way over the Plaintiff's land either by dedication or by uninterrupted user; and, if such right of way had been acquired, whether the road was repairable by the owner as a street under the 69th section of the Act.

The matters of fact in dispute were supported and negatived by a great bulk of evidence.

Mr. *Kay,* Q.C., and Mr. *Ince,* for the Plaintiff:—

The Defendants are proceeding under the 69th section of the *Public Health Act,* 1848 (11 & 12 Vict. c. 63). They have no other authority. From that section "highways" are excepted; and by sect. 13 of the 15 & 16 Vict. c. 42, the word "highway" is defined with express reference to this 69th section to be, "any highway repairable by the inhabitants at large."

We say, first, this is not a highway at all; it is private property; we can close it when we like. But if it be a highway, we then say it is a highway repairable by the inhabitants at large, and therefore not within the section.

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Taking the latter point first. If a passage leading from one part of a street to another, originally made for private convenience, has been open to the world for many years, without interruption, it is to be considered dedicated to the public—it becomes a "highway:" *Rex* v. *Lloyd* (1). So that if there has been a dedication to the public the road would be repairable by the public and not by us.

But there has not been in law a dedication to the public. The covenant in the lease of January, 1850, shewed an intention to dedicate, but the lease expired at the end of 1856, nearly sixteen years before the Defendant's notice in May, 1872; and since 1855, before which date the street and sewer were to have been made, the parties to the deed have all died, and no step has been taken by any one claiming under any party to carry out the works. The intention, therefore, has been abandoned; and even if the covenant should be found to be sufficiently clear in its terms to be capable of being enforced, the Defendants, who are neither parties nor privies to the deed, have no right to enforce it against the owner of the land.

The plan that was produced at the sale by *Kaye's* trustees in 1869 does not carry the matter further. The road which was then set out was planned in order to carry out a scheme, which was afterwards abandoned, of selling in different lots.

Thirdly, if there has been (which upon the evidence we deny) any user by the general public, it has not been an uninterrupted user. The interruptions which we say have taken place are sufficient to destroy any inference of dedication derivable from user. The putting up of the posts and chain, although the chain, not the posts, has been removed—as we say by us, or as the Defendants say in spite of us—is a sufficient interruption to rebut the presumption of dedication: *Roberts* v. *Karr* (2); *Woodyer* v. *Hadden* (3); *Rex* v. *Inhabitants of St. Benedict* (4); *Marquis of Stafford* v. *Coyney* (5); *Rex* v. *Inhabitants of Leake* (6); *Barraclough* v. *Johnson* (7); *Poole* v. *Huskinson* (8); *Pryor* v. *Pryor* (9).

(1) 1 Camp. 260.
(2) Ibid. 262, n.
(3) 5 Taunt. 125.
(4) 4 B. & A. 447.
(5) 7 B. & C. 257.
(6) 5 B. & Ad. 469.
(7) 8 A. & E. 99.
(8) 11 M. & W. 827.
(9) 26 L. T. (N.S.) 758. W.N. (1872) 111, 133.

To constitute a street within the *Local Government Act* (1858) *Amendment Act*, 1861 (24 & 25 Vict. c. 61, s. 28), there must be a row of houses sufficiently continuous, and sufficiently proximate to one another: *Reg.* v. *Fullford* (1). Where an unfinished road in a metropolitan parish contained inhabited houses along part of it, and communicated at one end only with another road containing houses placed singly at long intervals—the soil being private property, and the road never having been dedicated—it was held that the road was not a street under sects. 130 and 250 of the *Metropolis Local Management Act* (18 & 19 Vict. c. 120): *Reg.* v. *Vestry of St. Mary, Islington* (2). This 69th section does not give the Local Board power to make new streets, nor does it apply to streets repairable or partly repairable by the parish, but only to streets in no part repairable by the parish: *Local Board of Kingston-on-Hull* v. *Jones* (3). Where a street in a town which was within the *Public Health Act*, 1848, had been set out, opened, paved, and sewered by the owners in 1828, and had been constantly used by the public ever since, but had never been repaired by the owners, it was held to be a highway not within the 69th section, and hence repairable, not under the 69th section by the owners, but by the public: *Illingworth* v. *Montgomery* (4).

Mr. *Jackson*, Q.C., and Mr. *Bardswell*, for the Defendants:—

The real question is, whether this strip of land, being unquestionably private property, has been allowed by the owners in fee to be used by the public to such an extent as to have given the public a right to use it, and to prevent the owners from excluding the public from it.

The 69th section is intended to meet the case of private property over which the public have acquired a right to pass. This strip of land is in that sense a highway, but a highway not repairable by any authority constituted under the *Highway Act*, 1835. Highways are formed in three different ways; first, by special Act of Parliament; secondly, by prescription—both of which are out of the question here; and thirdly, by dedication; for which two things are necessary—an act of dedication, and an

(1) 33 L. J. (M. C.) 122. (3) 26 L. J. (Ex.) 33.
(2) E. B. & E. 743. (4) 2 L. T. (N.S.) 726.

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intention to dedicate. Along with the *factum* there must be the *animus dedicandi*. A road may be dedicated to the public by the owner of the soil throwing it open to the public, and allowing them to pass and repass without let or hindrance: *Glen* on Highways (1); *Rex* v. *Lloyd* (2); *Jarvis* v. *Dean* (3). Dedication may be presumed from user for a less period than twenty years—six years user has been held sufficient: *Rugby Trustees* v. *Merryweather* (4); "many years" was considered sufficient in *Jarvis* v. *Dean;* no particular time is necessary, and there are acts which will instantly make it a highway: *per Chambre*, J., in *Woodyer* v. *Hadden* (5); *Reg.* v. *Inhabitants of Brailsford* (6); *Reg.* v. *Midland Railway Company* (7). Here we have evidence of user for eighteen years.

It is said, however, that there has been interruption by the putting up of the bar, and *Roberts* v. *Karr* (8), *Poole* v. *Huskinson* (9), and *Barraclough* v. *Johnson* (10) have been cited. But these were cases of limited, not of interrupted, user. The posts and chain, in this case, were put up years after an adverse right had been acquired under the covenant.

That the freeholder can establish by covenant a right in the public to use a way as a street, which right may by user become indefeasible, appears from *Pryor* v. *Pryor* (11).

Rex v. *Inhabitants of St. Benedict* (12) was a case of indictment for non-repair before the *General Highway Act* (5 & 6 Will. 4, c. 50). There the road in question, having been dedicated to only a portion of the public, though used by the general public, was held to be repairable, not by the public, but by the owners. This decision was reversed in *Rex* v. *Inhabitants of Leake* (13), which went the length of deciding that the inhabitants of a parish were bound by law to repair all roads within it which were dedicated to and used by the public. The *Highway Act* (5 & 6 Will. 4, c. 50) remedied this state of the law by enacting (sect. 23) that no road made,

(1) Page 135.
(2) 1 Camp. 260.
(3) 3 Bing. 447.
(4) 11 East, 375, n.
(5) 5 Taunt. 125, 137.
(6) 2 L. T. (N.S.) 508.
(7) Glen on Highways, p. 146.
(8) 1 Camp. 262, n.
(9) 11 M. & W. 827.
(10) 8 A. & E. 99.
(11) 26 L. T. (N.S.) 758.
(12) 4 B. & A. 447.
(13) 5 B. & Ad. 469.

or to be made, at the expense of any private person should be deemed to be a highway which the inhabitants should be compellable to repair, unless the person proposing to dedicate should give such notice as is there prescribed of his intention to dedicate such highway to the use of the public. Ever since the commencement of that Act (20th of March, 1836), a road may be a highway, though the parish is not bound to repair it: *Roberts* v. *Hunt* (1); *Fawcett* v. *York and North Midland Railway Company* (2). Nor need the road be a thoroughfare: *Bateman* v. *Bluck* (3).

The true effect of the covenant was not of itself to confer a right upon the corporation as representing the public. It was an express act of dedication, shewing a clear intention to dedicate, which was afterwards completed by user. Thus the road became a highway, but the owner never having given notice under the *Highway Act*, it remained a highway repairable, not by the public, but by the owner.

Upon the evidence we maintain that the attempted interruption of the right of the public was removed as of right, and that the removal was acquiesced in by the Plaintiff; and then that the intention and act of dedication were confirmed by the sale plan, which was issued in 1869, only three years before we served the Plaintiff with our notices.

Mr. *Kay*, in reply.

Feb. 10. SIR JAMES BACON, V.-C., after stating the questions in the suit, the Plaintiff's title, and the claim of the Defendants, as given above, continued:—

Upon this record, then, two questions arise. They are, first, whether the road in question, by whatever name it may be called, has been so dealt with by the former or present owners that it must be held to have been thereby dedicated to the use of the public; and the second is, there being or not being a dedication, whether the public have by long and uninterrupted custom and practice acquired the right of using and passing over it as a public way.

(1) 15 Q. B. 17. (2) 16 Q. B. 610. (3) 18 Q. B. 870.

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Then there remains a further question to be considered, viz., whether, in whatever way the preceding questions be determined, under any circumstances the Defendants are entitled to make, and the Plaintiff is bound to comply with, the requisition expressed by the notice.

The dedication asserted by the Defendants is said to be shewn, first, by the covenant contained in the lease of 1850. In my opinion that covenant amounts at the most to a contract to be performed within the then next five years by the parties to the deed. [His Honour read the words of the covenant above stated.] What were the intentions of the parties to that deed at its date as to forming a street, it is not difficult to gather from the terms of the covenant, but it is equally clear that, from that day to this, no one of the parties to that contract has, at any time, performed or sought to perform any one of the stipulations. After four or five and twenty years no proceeding can be taken at law on such a covenant if it were free from any other objection. Nor, from the vague and uncertain terms in which the then contemplated street was agreed to be formed, could either of the parties have been at any time compelled to perform it specifically. On what part or parts of the closes over and along which the road was to go, in what direction, from and to what points, how it was to be formed or constructed, are all left, as it appears to have been intended they should be left, to the future arrangements of the parties. None of the parties are now alive, and none of them have done anything from which their intentions in these essential particulars can be ascertained. But an inference may most justly be drawn from the fact that nothing was done, viz., that they had at least tacitly agreed that the covenant should not be binding on or enforced by them or their successors or representatives. It is certain that, under these circumstances, no specific performance could be decreed, nor could the Defendants, being neither parties nor privies, rely upon or attempt to enforce the contract, although they may be entitled to resort to the expressions in the deed as evidence of an intention by the owners of the land in 1850 to dedicate some portion of their respective properties to the formation of a public road. Beyond a mere intention, however, I think nothing is to be inferred, and the evidence shews that nothing

conclusive was done or purported to be done in fulfilment of that intention, or in performance of the stipulation in the deed.

Another circumstance is adduced by the Defendants, and relied on as proving that the road was dedicated and made. The trustees of *Kaye*, one of the parties to the lease, and who had afterwards become the owner of the land, sold it by auction in 1869, and on that occasion a plan was prepared, on which was written the words, "Road ten yards wide," over a space there delineated, and in the direction of what is now called *Union Street*. This plan is in evidence, and it answers the description given of it by the Defendants. But the history of it is given in the affidavits of Mr. *North* and his clerk, *Gray*, from which it appears that the land had been, on a previous occasion, offered for sale in one lot, without any mention of a road being thereon. No sale being then effected, it was again put up by auction in 1869, and was then described as being in two lots, that division being considered by the vendors as likely to fetch a better price; and as, if sold in two lots, there must of necessity be a road between the lots, in order to give access to each, the plan was drawn shewing a road ten yards wide, with a suggestion that the road might be improved by making a slight deviation into the property of an adjoining owner, but which could not be done without his consent. Both these witnesses say they were not aware of any existing road, that it was not so treated or considered at the sale, and that Lot 2 was represented as a desirable building plot. It appears to me, therefore, that there was nothing binding in this description; that it was resorted to solely for the purpose of attracting purchasers if the estate should be sold in two lots. So far, therefore, as the Defendants rely upon this plan, made eighteen years after the lease of 1850, as a proof of the alleged dedication, it appears to me to fail.

[His Honour then discussed the evidence as to three cases of interruption offered to the passage of the public across the Plaintiff's land, and considered them to have been distinctly proved: one, that of the posts and chains put up by *J. W. Akeroyd* soon after his purchase; a second, that of the gap in the wall, made by *Kaye* for the purpose of introducing the steam-boiler, where he afterwards hung a gate; and the third, the attempts made by

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Kaye and *Ackroyd* to warn off and prosecute trespassers; and continued:—]

These facts, then, being clearly established by the evidence on both sides, what is the legal consequence of such interruption? The authorities upon the subject are clear. An owner who throws open a passage through his land, and neither marks by any visible distinction, nor excludes persons from passing through his land by positive prohibition, shall be presumed to have dedicated it to the public: *per* Lord *Ellenborough*, *Rex* v. *Lloyd* (1). It must, therefore, be concluded that the obstruction of a locked gate, post, and chains, which cannot be passed even by foot passengers (as the Defendants in their answers allege was here the case) otherwise than by getting under them—the notice board, and the active personal turning back and threats of prosecution, do constitute a visible distinction and positive prohibition, which do, in this instance, rebut the presumption of dedication to the public. In *Roberts* v. *Karr* (2) it was held that the erection of a bar, though it may have been knocked down, rebuts the presumption that a way has been dedicated to the public. And in *Lethbridge* v. *Winter* (3) it having been decided at *nisi prius* that a gate recently put up in a place where, for the last twelve years, there had been none, rebutted the presumption of dedication to the public. Many other authorities might be referred to in support of the same proposition. In *Poole* v. *Huskinson* (4) the rule of law is thus expressed by Baron *Parke*, the other Judges of the Court of Exchequer concurring:—"In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate, there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment."

Against the Plaintiff's evidence the multitudinous array of witnesses brought forward by the Defendants cannot be considered as of any weight. Although they number more than three score, the sum and substance of what they say is, that for a period of

(1) 1 Camp. 260.
(2) Ibid. 262, n.
(3) 1 Camp. 263, n.
(4) 11 M. & W. 830.

eighteen years the public have used the way in question for horses, carts, carriages, and foot passengers, without any other interruption than that effected by *J. W. Akeroyd's* posts and chains. During a portion of this period it is admitted that the slack and refuse from the coal-pit covered a considerable portion of what is called the road; but the witnesses I am now referring to say that space enough was left to enable the public to pass. Excepting in this latter particular, there is no serious discrepancy between what they say and what the Plaintiff's witnesses allege; for the case presented by the latter is, that persons did pass along the road—narrow, difficult, and dangerous as it was—deep in mud at some seasons, impeded by the pit hill, and by holes and ponds which had been occasioned by the brick-making established on the Plaintiff's land after the coal had been exhausted; the substantial difference between the witnesses being, that those on the part of the Plaintiff proves circumstantially and in detail that such passing along was not only without the consent or authority of the Plaintiff, but was always against his will, and that of his predecessors. Why sixty people are brought by the Defendants to prove facts which could just as well be proved by six, is a question which I have asked myself, without being able to find a satisfactory reply. Nor have I been able to understand why, in the stereotyped affidavits of the Defendants, the way in question is almost always called "*Union Street.*" It is not, and never was, a street. The intention to make a street, and, when made, to call it *Union Street*, may be gathered from the lease of 1850; but it has no other origin or foundation. Such way as there was, was called the *Pit Road*—a name not without significance while the coal-pit was in working; but, until some time shortly before the present dispute arose, I can find no trace in any document referred to of the existence of any *Union Street*, except that, in the Directory of 1870, Mr. *Blakey*, who bought the timber of the Plaintiff, is described as living in *Union Street*, but not on any part of the Plaintiff's land.

The evidence is of inordinate length. Several days were occupied in stating it, and in arguments upon it. Since the hearing I have considered it fully and with the utmost care. I do not think it necessary to go through it more minutely, but there is one por-

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tion of it which I think it right to observe upon:—[His Honour adverted to a conflict of evidence which appeared between two surveyors, and decided, by reference to an original map made by *Michael Sheard* in 1856, that the existence of gates at that time at the eastern and south-western ends of the Plaintiff's close was clearly proved.]

Upon this branch of the case the evidence leads me to the clear conclusion that there was no dedication in fact to the public use, and the law compels me to declare that whatever presumption of intention can be derived from the map, or sale-plan, or any other of the topics relied upon by the Defendants, is conclusively and effectually rebutted by the proof of earnest, frequent, and unmistakable interruption.

But another question not less important than that to which the preceding observations apply, has been raised and argued, and calls for decision. The Plaintiff insists that, even if the Defendants have succeeded or can succeed in their contention as to the alleged dedication and public use of a way over his land, they have, nevertheless, no power to enforce the notice which they have served upon him. It cannot be questioned that the only authority possessed by the Defendants is that which has been conferred upon them by statute. The 11 & 12 Vict. c. 63, by which Local Boards of Health are constituted and regulated, contains in the interpretation clause this enactment: "The word street shall apply to and include any highway, and any road, lane, footway, &c., whether a thoroughfare or not." And then follow numerous clauses relating to the improvement of the sanitary condition of towns and populous places, which is stated in the preamble to be the object of the Act, and respecting which very extensive powers are entrusted to the Boards. By the 68th section, all present and future streets being, or which at any time become, highways, and all pavements, materials, &c., shall vest in and be under the control of the Boards. By the 69th section it is enacted thus:—[His Honour read the section, and continued:—] Upon this section the Defendants' notice is framed, and the words of this section are adopted and set forth in the answer, as authorizing that notice. Upon the restrictive words "not being a highway" being pointed out and insisted on by the Plaintiff's counsel, as excluding the

power of the Board, if the road be a highway, as the Defendants have sought to prove, the Defendants reply by referring to the statute 15 & 16 Vict. c. 42, which is incorporated with the *Public Health Act*, as if they were one Act, and by the 13th section whereof it is enacted that "the term highway in the sections of the *Public Health Act*, 1848, numbered 68 and 69, shall mean any highway repairable by the inhabitants at large." Thereupon the question immediately arises, whether the way which forms the subject of this suit, by whatever name it may be called, is or is not "a highway repairable by the inhabitants at large;" for if it be, the Local Board of Health are not empowered by the 69th section to give or enforce the notice which they have served upon the Plaintiff, and out of which this suit arises.

By the Common Law, so long and so well established as to make it hardly necessary to refer to authorities, the duty of repairing highways is (with some few exceptions which have no application to the present question) cast upon the inhabitants. But if any support to that general proposition were needed, it would be readily furnished by the decision in *Reg.* v. *Inhabitants of Lordsmere* (1), where Lord *Campbell* (2) stated the rule of law to be that, "a parish is bound to repair any highway within it, whether the highway be ancient or modern;" and he says, "Dedication amounts to an irrevocable licence granted to the public, who are to have the right of travelling along the road at their free will and pleasure. It thus becomes a highway, and the incident of its becoming so is, that the parish is bound to repair it." *Coleridge*, J. (3), adds: "If the public have such rights on the road as ordinarily exist in the case of a highway, the liability of the parish is the same, whether it be an old immemorial highway, or one created only yesterday." The other Judges concur, and *Patteson*, J. (4), observes, that "the old doctrine of adoption by the parish through which the road passes has been now quite abandoned."

The duty of repairing a highway is incontestably a public burthen to be borne by the persons dwelling in the place where it exists. The Defendants' witnesses, almost all of them, have sought

(1) 19 L. J. (M.C.) 215.
(2) Ibid. 220.
(3) 19 L. J. (M.C.) 222.
(4) Ibid. 221.

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to prove that this way is a highway. In crowds, by scores, they have said that ever since it was first opened—not less than eighteen years ago—it has been a public road, used by the public "as a foot, horse, carriage, and cattle road." I know of no words by which a highway can be more completely described. I can conceive no form of expression by which, whether in its familiar or in its strict legal sense, a highway can be more accurately defined. I have been somewhat struck whilst perusing the answer and examining the affidavits—which I must assume to have been prepared after due consideration, and which display unquestionable professional skill—with the circumstance that the word "highway" never once occurs in them. "Street" and "road" (though "street" in its ordinary and true sense there is not, and never was, and no road has ever been made), are abundantly repeated. This forbearance to use the only word which would accurately render the meaning of the witnesses may have been simply accidental; but, whether so or not, the nature of the thing remains unchanged, and no one can hesitate to say that the Defendants in fact plead, and the Defendants' witnesses in effect assert and seek to establish, that the way in question was a highway and nothing else.

But that the Defendants must have had a notion that there might be some danger in the point I have touched upon, I am led to believe when I read in their answer that "the street after being formed was named *Union Street*, and was thrown open to and used by the public, although it has never been dedicated to the use of the public in manner provided by the statute 5 & 6 Will. 4, c. 50." And it has been argued that, by force of that statute, the way in question was and is not repairable by the inhabitants at large. But the statute justifies no such contention. It does not in any degree abrogate or even affect the common law right. It does provide by sect. 23 that no road made or to be made by and at the expense of any person shall be taken to be a highway which the inhabitants shall be liable to repair, unless the person proposing to dedicate such highway to the use of the public shall give the notice thereby required of his intention, and shall have made the same in a substantial manner and to the satisfaction of two justices, who are to view and certify, and thereupon, and after

the highway shall have been used by the public, and duly kept in repair by such person for twelve months, such highway shall be kept in repair by the parish, provided the vestry agree to or do not sustain a stated objection to the same. But this section has no application to the case of a person who has not made the road at his own expense, who does not propose to dedicate the highway to the use of the public, and who does not intend or undertake to make it or to keep it in repair at his own expense for twelve months, in order at the end of that period to throw the future care and expense of the highway on the surveyor and the general rate. And the same statute, by sect. 62, provides that a person "liable to repair any highway by reason of tenure of any lands, or otherwise howsoever," may, with the consent of a vestry of a parish, apply to a justice for the purpose of making the highway a parish highway, and to be repaired by the surveyor, when the justices in special sessions may proceed in the presence of the parties, and if they decide that the highway shall become a parish highway, they shall fix the proportion to be paid by the person so applying to the surveyor. But this clause applies only to the case of persons who are liable *ratione tenuræ*, or otherwise, to keep the highway in repair: *Gibson* v. *Mayor, &c., of Preston* (1), and who, together with the vestry of the parish, desire to commute such liability.

Assuming that the road has been made as the Defendants assert, that would affix no liability upon the Plaintiff. If the Plaintiff had thrown open his land from end to end, and had permitted the public to traverse and use a passage over it at their pleasure, that would not make him liable to keep it in repair. In the public interest a highway must and ought to be repaired, and the legal liability so to repair rests of necessity upon the inhabitants at large. Upon this latter branch of the case, therefore, being, as I am, of opinion that it cannot be truly said that the Plaintiff is in any view of the case liable to repair the road or way, and if this were the whole of the case to be decided, I should, as I do, entertain no doubt that, the statutes not having conferred upon the Defendants, the Local Board of Health, any such power or authority as by their notice they have claimed to exercise, but having

(1) Law Rep. 5 Q. B. 218.

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in express terms excluded them from all such power over highways repairable by the inhabitants at large, their proceeding against the Plaintiff has been wholly unlawful and unjustifiable. Under these circumstances, and for the reasons I have given, I think that the Plaintiff is entitled to the relief sought by the first paragraph of the prayer of his bill. I regret that the litigation which has arisen out of the Defendants' notice has been so long, so costly, and so burthensome and useless in every sense as it has become. It would probably have been better for the Plaintiff to have given up to the Defendants his acre and a half of land, and his shoddy manufactory, if the Defendants would have accepted it, as ransom from the burthen they have sought to impose upon him, and from the nearly three years' litigation in which he has been involved. All, however, that the Court can do upon this record is to decree that a perpetual injunction do issue in the terms I have referred to, and that the Defendants pay the Plaintiff his costs of the suit.

Solicitors for the Plaintiff: Messrs. *Learoyd, Learoyd, & Peace*, agents for Messrs. *Learoyd & Learoyd, Huddersfield.*

Solicitors for the Defendants: Messrs. *Edwards, Layton, & Jacques*, agents for Messrs. *Deane & Son, Batley.*

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Feb. 17, 18, 19, 24; March 3.

Will—Tenant for Life and Remainderman—Leasehold Collieries—Profits, how to be enjoyed.

A testator, seised of real estate, and possessed of leasehold collieries which he was working, by his will devised all his real estate, "and also" all his leasehold estates, "and" all his "goods, chattels, and credits" to three trustees, so that they should have the legal estate, upon trust, as to one moiety for his married daughter for life (not to her separate use), then to her husband (one of the trustees) for life, then to her first son absolutely; and as to the other moiety for his only other child, an unmarried daughter, for her separate use for life (without restraint upon anticipation), then to her children, and in default (which happened), upon the trusts of the other moiety. He empowered the married daughter, and her husband, and also the unmarried daughter, to appoint portions to be raised and paid out of his "said real and personal estates respectively." He empowered the unmarried daughter to appoint any part not exceeding one half of the "rents, issues, and profits, interest, dividends, and annual income" of her moiety during the lifetime of any husband for his use. The trustees were empowered to "levy and raise and pay and apply" for advancement any part or parts of the moieties; and to pay and apply such part as they should think fit of "the income and annual produce" for maintenance. He gave power to the trustees to lease "all or any part" of his "said freehold or leasehold estates" for twenty-one years; to "alter, vary and transpose" the "state of investment of the property," provided that the same should consist of "real estate, securities upon real estate, or shares in the public funds," for which purpose, and also for the purpose of "raising" such sums of money as it might become "necessary to raise in pursuance of the powers," to "sell and convert into money" all or any part of the "said trust estates," or to mortgage the same. He then empowered the trustees, "in case they shall deem it beneficial so to do," to continue the collieries and either to increase or abridge the business thereof, and all losses, costs, charges and expenses of carrying on the business should be "borne, paid, and defrayed" out of his "real and personal estate," and also to procure any lease of the collieries to be renewed, and to continue the business after such renewal.

The testator died in 1834. The son-in-law was the sole proving executor, and was the only acting trustee until the marriage of the unmarried daughter in 1835, shortly after which date her husband was appointed co-trustee. The trustees continued and enlarged the colliery business for thirty-seven years, taking leases of additional collieries, making large profits, and greatly increasing the value of the plant.

Upon suit by the eldest son of the elder daughter, claiming to have the

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profits over £4 per cent. on the value of the collieries at the death of the testator capitalized, and made to form part of the estate:—

Held, that there were sufficient indications of intention in the will to exclude the operation of the rule in *Howe* v. *Lord Dartmouth* (1), and that the tenants for life were entitled to the enjoyment in specie of the produce of all the collieries.

MOTION for decree.

John Hargreaves, of *Ormerod House* and of *Bank Hall*, near *Burnley*, being seised of considerable real estate, and also possessed of collieries which were being worked by him under leases from other owners, by his will, dated the 19th day of May, 1832, devised and bequeathed "all and every the manors, messuages, lands, tenements and hereditaments, and all other my real estate of or to which I or any person or persons in trust for me am, is, or are seised or entitled," whether freehold or copyhold, "And also all and every my leasehold estates, lands, and tenements, and all my goods, chattels, and credits," and other personal estate to the use of three persons, of whom *William Thursby* and *Thomas Legh* became the survivors, "their heirs, executors, administrators, and assigns, according to the nature and quality of the said premises respectively, as trustees, and so that they may have and hold the legal estate therein," upon trust, as to one moiety, for his daughter *Eleanor Mary*, wife of *William Thursby*, for life, and after her death, upon trust for the said *William Thursby* for life, and after the decease of the survivor, upon trust for the first or only son of *Eleanor Mary Thursby* who should attain twenty-one, his heirs, executors, administrators, and assigns, absolutely, "according to the respective nature and qualities of the said premises." He empowered *William Thursby* and *Eleanor Mary* his wife, or the survivor of them, to appoint such sum and sums of money "to be raised and paid out of my said real and personal estates respectively" for the portions of younger children as they or the survivor should think proper. He declared that the trustees should be seised and possessed of the other moiety upon trust for the separate use of his daughter *Charlotte Hargreaves* for life (but without any restraint upon anticipation); and he empowered her to appoint that any part not exceeding one-half of the "rents, issues, and profits, interest, dividends, and annual

(1) 7 Ves. 137.

income," which after her death should accrue due on the last-mentioned moiety, during the lifetime of any husband she might marry, should be paid to him for his use. The testator directed that after and subject to the estates and interests of his said daughter *Charlotte*, and any husband she might marry, the moiety and the income thereof should be held in trust for the children of *Charlotte* as therein mentioned; and he empowered his daughter *Charlotte*, whether covert or sole, to appoint "such sum and sums of money to be raised and paid out of my said real and personal estates respectively" for the portion, or for the maintenance, education, or advancement of all or either of her children as she should think proper. He empowered the trustees "at any time and from time to time" thereafter to "levy and raise and pay and apply" for the advancement of the respective eldest or only sons of his daughters any part or parts of the respective moieties, but during the lifetimes of the respective parents only with their consent. He further directed that, after and subject to the estates and interests of *William Thursby* and *Eleanor Mary* his wife, and *Charlotte Hargreaves* and any husband who might survive her in whose favour she might have exercised her power of appointment, "and in the meantime and until my said real and personal estate shall become vested in such eldest or only sons" respectively, it should be lawful for the trustees to pay and apply so much as they should think fit of "the income and annual produce of the respective moieties" for his or their maintenance and education. The testator directed that in case either of the moieties should not vest absolutely, it should be held upon the trusts declared of and concerning the other moiety; and in case there should be no person in whom both the moieties should vest, then that the whole should be held in trust for the testator's sister *Ann*, wife of *John Fawcett*, "her heirs, executors, administrators, and assigns, according to the nature and quality thereof."

The will then contained powers of leasing, of selling, and of continuing the testator's colliery business, in the following terms:—

"And I hereby further declare and direct that it shall and may be lawful to and for the trustees or trustee for the time being of this my will to lease all or any part of my said freehold or leasehold estates unto any person or persons for any term or number of

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years not exceeding twenty-one years from the making of such leases respectively, so as there be reserved in all such leases to be granted as last mentioned the best and most improved yearly rents that can be reasonably gotten for the same without taking any fine or premium."

"And I do hereby declare that it shall be lawful for the trustees or trustee for the time being of this my will from time to time to alter, vary, and transpose the state of investment of the property which from time to time shall be by them held upon the trusts aforesaid; provided and so that the same shall be made to consist of real estate, securities upon real estate, or shares in the public funds, for which purpose and also for the purpose of raising such sum or sums of money as it may become necessary to raise in pursuance of the powers and provisions in this my will, it shall be lawful for the said trustees or trustee from time to time to sell and convert into money all or any part of the said trust estates, or to mortgage the same either absolutely or in fee, or for any term or number of years, and to receive the moneys arising therefrom, and give and sign receipts therefor, and to lay out and invest the same or the remainder thereof, after paying such sum or sums of money as aforesaid, in the purchase of real estate, or on securities upon real estate, or in the public funds, and from time to time to alter, vary, and transpose such investments as aforesaid."

"And I hereby empower the trustees and trustee for the time being of this my will, in case they shall deem it beneficial so to do, to conduct, carry on, and continue the collieries which I am possessed of, and either to increase or to abridge the business thereof; and all losses, costs, charges, and expenses of carrying on and continuing the said business shall be borne, paid, and defrayed out of my real and personal estate, and also to procure any lease or leases of the said collieries to be renewed to them, and also to continue the business thereof after such renewal."

The testator died on the 5th of April, 1834, a widower, and leaving his only issue the above-mentioned daughters, Mrs. *Thursby* and Miss *Charlotte Hargreaves*. The will was proved by *William Thursby* alone.

The personal estate was insufficient, and a portion of the real

estate, with which the debts, funeral, and testamentary expenses and legacies were paid, was sold by the trustees.

The collieries of which the testator was possessed at his death were eleven in number, held under three separate leases. The stock belonging to them was valued on the 31st of December, 1834, at £17,575 0*s.* 9*d.*

In December, 1835, Miss *Charlotte Hargreaves* married the Hon. *James Yorke Scarlett*, afterwards General Sir *James Yorke Scarlett;* and in September, 1836, General *Scarlett* was appointed one of the trustees of the will, together with *William Thursby* and *Thomas Legh.*

In May, 1857, *Thomas Legh* died.

General *Scarlett* died on the 6th of December, 1871, having by will bequeathed the whole of his property, real and personal, to his widow, Lady *Scarlett*, and having made her his sole executrix.

There was never any issue of the marriage of General and Lady *Scarlett.*

William Thursby and General *Scarlett*, who were the acting trustees of the testator's will, continued the business, renewed the existing leases when they expired, and took or agreed to take leases of other collieries, with the result that, during the thirty-seven years which elapsed from the testator's death to the death of General *Scarlett*, the profits averaged nearly £11,500 a year. The colliery plant was valued in December, 1871, at £161,533 10*s.* 7*d.*

On the 22nd of March, 1872, Lady *Scarlett* was found by inquisition to be a lunatic; and the question arose, whether the tenants for life were entitled to the profits of the collieries in specie, or whether they were entitled to only 4 per cent. on the value of the collieries at the testator's death, the surplus forming part of the testator's estate.

Administration with the will annexed of General *Scarlett's* estate was, on the 14th of November, 1872, granted to Mrs. *Thursby* during the lunacy of Lady *Scarlett.*

The bill was filed on the 7th of January, 1873, by the first son of Mrs. *Thursby*, named *John Hardy Thursby*, who was born on the 31st of August, 1826, against *William Thursby*, *Eleanor Mary*

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his wife, Lady *Scarlett*, and *Thomas Hughes*, her committee in lunacy, and the representatives of *Thomas Legh*.

It prayed (amongst other relief which it is unnecessary for the present purpose to state) for a declaration that the tenants for life under the will "were not and are not" entitled to receive the rents and profits of the collieries in specie, and that a value ought to be put upon the collieries of the testator at the time of his death, and that such allowances might be made to the tenants for life out of the profits, by way of interest, as to the Court should seem proper; and that the residue of the profits ought to be invested and form a part of the testator's estate.

It further prayed a declaration that the Defendant *William Thursby*, and the estates of General *Scarlett* and *Thomas Legh*, were jointly and severally liable to make good to the testator the amounts received out of the proceeds of the collieries on account of the tenants for life in excess of the amounts to which they were properly entitled; but at the hearing the relief prayed against the estate of *Thomas Legh* was abandoned, and his representatives were dismissed from the suit with their costs.

Mr. *Southgate*, Q.C., Mr. *Little*, Q.C., and Mr. *Edmund S. Ford*, for the Plaintiff, the remainderman:—

We rely upon *Meyer* v. *Simonsen* (1) and *Brown* v. *Gellatly* (2). The question is, has the testator bequeathed his mines in specie, so that the tenants for life can take all the profits, or are they entitled to no more than £4 per cent. interest on the value from the time of the testator's death, and interest on the capital sum which should have been accumulated from year to year by accretions of surplus of profits over such £4 per cent., and invested in £3 per Cent. Government Stock?

The only clause which furnishes ground for argument is the power to continue the colliery business; and there, the words "in case they shall deem it beneficial so to do" are equivalent to the words "for the benefit of my estate" in *Brown* v. *Gellatly*.

In other respects, it is the ordinary case of a gift to a tenant for life, with remainders over. The words "rents, issues, and profits"

(1) 5 De G. & Sm. 723. (2) Law Rep. 2 Ch. 751.

occur only once. The power of leasing is in the ordinary form of a power to grant agricultural leases; it does not extend to mines.

In *Morgan* v. *Morgan* (1) the absence of a trust for conversion was relied upon, but the rule was applied notwithstanding. Here we have a power for conversion. But in truth no trust for conversion is necessary, where there is an intention to give enjoyment in succession. "Beneficial" means beneficial, not for one class of takers to the injury of another, but beneficial for all alike: *Gibson* v. *Bott* (2); *Howe* v. *Lord Dartmouth* (3); *Caldecott* v. *Caldecott* (4); *Meyer* v. *Simonsen* (5); *Re Llewellyn's Trust* (6); *Brown* v. *Gellatly* (7).

That a lease renewed by a trustee is renewed for the benefit of the estate, appears, if necessary, from *Keech* v. *Sandford* (8); and it is equally clear that a trustee cannot make a profit out of the trust estate for his own benefit.

Mr. *Jackson*, Q.C., and Mr. *E. Cutler*, for the committee in lunacy of Lady *Scarlett*:—

The rule in *Howe* v. *Lord Dartmouth* may be applied to a gift of residue; it has never been applied to a specific devise or bequest. It is confined to cases of property given *en masse*, to be enjoyed in succession: *Pickering* v. *Pickering* (9).

The presence or absence of a trust for conversion makes all the difference. In this case there is a power to convert, but not an absolute trust for conversion. The principle of *Brown* v. *Gellatly* was that the testator intended his ships to be sold, sooner or later, and the question was what was to be done with the intermediate profits. Here the will is full of indications of a contrary intention. Lady *Scarlett's* separate life estate is without restraint on anticipation; the ultimate gifts are "according to the respective nature and quality of the said premises," and "according to the nature and quality thereof;" portions and maintenance money are to be "raised and paid out of my said real and personal estates

(1) 14 Beav. 72.
(2) 7 Ves. 89.
(3) Ibid. 137.
(4) 1 Y. & C. Ch. 312.
(5) 5 De G. & Sm. 723.
(6) 29 Beav. 171.
(7) Law Rep. 2 Ch. 751, 758.
(8) Select Ca. Ch. 61.
(9) 4 My. & Cr. 289.

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respectively;" the sums, if any, to be appointed for *Charlotte's* husband are to be any part not exceeding one-half of the "rents, issues, and profits;" the trustees have power to "levy and raise" for advancement; and, until "my said real and personal estate shall become vested," pay and apply parts of the "income and annual produce" of the moieties for maintenance. Finally, the trustees have a discretionary power either to sell and convert, "or" to mortgage.

Indications against an intention to convert were found in *Alcock* v. *Sloper* (1); *Bethune* v. *Kennedy* (2); *Daniel* v. *Warren* (3); *Bowden* v. *Bowden* (4); *Burton* v. *Mount* (5); *Simpson* v. *Lester* (6). The latter case established that the Court looks at a direction to sell at a particular time, or for a particular purpose only, as excluding the operation of the rule. The use of the word "rents" was considered enough in *Goodenough* v. *Tremamondo* (7); when the will was silent, in *Hinves* v. *Hinves* (8); *Cafe* v. *Bent* (9); *Crowe* v. *Crisford* (10); *Green* v. *Britten* (11).

In *Brown* v. *Gellatly* (12) a primary trust to convert was assumed throughout; so in *Morgan* v. *Morgan* (13) and in *Re Llewellyn's Trust* (14); if there be an absolute trust to convert, *cadit quæstio*. In *Meyer* v. *Simonsen* (15) there was a gift of residue *en masse*, but no direction as to management or enjoyment.

The Court will also keep in view the laches of the Plaintiff, who came of age in 1847, and has stood by for twenty-five years: *Acheson* v. *Fair* (16); *Clegg* v. *Edmondson* (17).

Mr. *Kay*, Q.C., and Mr. *Cecil Russell*, for Mr. and Mrs. *Thursby*:—

Mrs. *Thursby* is tenant for life, not to her separate use; Mr. *Thursby* is trustee and executor; and Mrs. *Thursby* is administratrix during lunacy of the estate of the other tenant for life, who is administratrix of the other trustee.

(1) 2 My. & K. 699.
(2) 1 My. & Cr. 114.
(3) 2 Y. & C. Ch. 290.
(4) 17 Sim. 65.
(5) 2 De G. & Sm. 383.
(6) 4 Jur. (N.S.) 1260.
(7) 2 Beav. 512.
(8) 3 Hare, 609.
(9) 5 Hare, 24.
(10) 17 Beav. 507.
(11) 1 D. J. & S. 649.
(12) Law Rep. 2 Ch. 751.
(13) 14 Beav. 72.
(14) 29 Ibid. 171.
(15) 5 D. G. & Sm. 723.
(16) 3 D. & War. 512.
(17) 8 D. M. & G. 787.

The Plaintiff does not seek a sale; he does not ask the Court to put a stop to the business—will the Court give him profits made before the filing of the bill?

As for the rule in *Howe* v. *Lord Dartmouth* (1), the Courts have always leaned against it; they have applied it unwillingly; and it will readily yield to evidence of a contrary intention. Here the testator has bequeathed all his "leasehold estates" as a separate class of his property. In many cases the test has been, Had the testator any leaseholds? If so, it has been held that the word "rents" can only be satisfied by enjoyment in specie. Again, if any part of a wasting property is to be retained in specie, the whole must be retained. Now, there is no direction at all to convert the leaseholds; there is a power to convert, and no more. A case cannot be found in which, where a testator, having leaseholds, gives a power to lease those leaseholds, the tenant for life is not to enjoy in specie. It has been said that this power of leasing will not apply to mines. But it has been held otherwise from early times: *Campbell* v. *Leach* (2); *Daly* v. *Beckett* (3); *Sugden* on Powers (4); *Clegg* v. *Rowland* (5). It is not arguable that this power does not include the leaseholds, that is to say, the leasehold mines. Why were the tenants for life made dispunishable of waste? Suppose the trustees had let the leasehold mines, taking the rents, what possible claim could the Plaintiff have had to any part of those rents? Where is the direction to capitalize the rents? Why should the testator give Mrs. *Thursby* an estate, not for her separate use, and then make Mr. *Thursby*, who thus became the beneficiary, his trustee, if not that the tenants for life were to enjoy in specie? And to this very person he gives the power of leasing. The clause about continuing the business must be read with the power of leasing; and if the rents of the mines would have been a part of the income to which the tenant for life was entitled, why not the actual profits for which those rents would have been a substitute?

Did the testator intend that the tenant for life was not to take profits, when he has thrown upon him not only losses, but the

(1) 7 Ves. 137.
(2) Amb. 740.
(3) 24 Beav. 114.
(4) 8th Ed. p. 735.
(5) Law Rep. 2 Eq. 160.

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costs of working, such as sinking a shaft? Was a tenant for life to make such an outlay, and not take the profits? Why should he give the trustees the power to use all his real and personal estate for the purpose of extending the works?

In *Brown* v. *Gellatly* (1) the words were, for the benefit "of my estate." No such words occur here.

If the Plaintiff seeks his strict right, we may say—"You shall have your right; undo all that has been done, but if you do that, you must at the same time renounce all the benefit of what you say is your trustees' wrong-doing. We submit to treat the mines, as they stand, with the plant, as part of the trust estate; but we must use every weapon of defence; and if you come, the answer is, you come too late."

Mr. *W. Pearson*, Q.C., and Mr. *Townsend*, for the representatives of *Legh*.

Mr. *Southgate*, in reply:—

[He dealt with the cases, and further cited *Craig* v. *Wheeler* (2) and *Blann* v. *Bell* (3).]

The expression "according to the respective nature and qualities" merely refers to the two classes of representatives. The word "rents" here is satisfied by the fact that the testator had freeholds. The testator did not make Mr. *Thursby* his sole trustee. No issue of laches or acquiescence is raised by the pleadings: and a remainderman, who is not a trustee, may come when he pleases.

Without denying the authority of the cases as to the leasing power extending to mines, can that be used as evidence of intention? Would the whole proceeds of such a lease have gone to the tenant for life? That is the whole question. Was the plant to have been leased? If so, it would have been worn out at the end of the term. The framers of this will did not intend the leasing power to extend to the mines and plant; if they did intend it, why did they not say so?

The testator has not said that all the profits shall be given to the tenant for life, and the losses, if any, borne by the remainder-

(1) Law Rep. 2 Ch. 751. (2) 29 L. J. (Ch.) 374.
(3) 2 D. M. & G. 775.

man. Suppose a calamity like the firing or drowning out of a mine to occur, could the remainderman have called on the tenant for life to make it good? If the Defendants' contention is right, the trustees might have sold the freeholds and laid out the proceeds in mines.

Mr. *Jackson*, in reply on *Craig* v. *Wheeler* (1) and *Blann* v. *Bell* (2).

March 3. SIR JAMES BACON, V.C.:—

The question in this case is in its nature of the simplest kind. I do not mean that the solution of it is wholly free from difficulty, or that the copious materials which have been submitted to the Court in the shape of statement on the record, or in the arguments at the Bar, have been superfluous or longer than the interests of the parties may have required, but having given the fullest consideration to all that has been pleaded, and proved, and debated, I find that there is but one question to be decided, and that depending wholly upon the true construction of the will of the testator. That duty, then, of construing the will devolving upon the Court, I have now to discharge it. The single question arising upon that will is this: Has the testator so disposed of his whole property as to entitle the persons to whom he gave life interests in that property to possess and enjoy it in the same manner as it was possessed and enjoyed by him up to his death, or does the rule of this Court, which constitutes the law, require that, as to a very important part of that property, the right of the tenants for life should be restricted, and that the amount and value of what they have received and may receive must be very sensibly diminished? That the pecuniary value of the subject in dispute is considerable, cannot, I need not say, affect the decision. The law is and must be the same in all cases, and in all cases like the present the first and most important consideration is the intention of the testator as it is expressed in and of necessity to be gathered from the terms of the will. In investigating that subject the greatest circumspection and caution are indispensable.

(1) 29 L. J. (Ch.) 374. (2) 2 D. M. & G. 775.

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[His Honour described the terms of the will, the state of the family, the claims of the parties, and the constitution of the suit, and continued:—]

There being no material fact in dispute between the parties, the Plaintiff's counsel have argued that he is entitled to the relief he seeks.

Among many authorities to which they have referred, the most prominent, and that most relied on, is *Howe* v. *Lord Dartmouth* (1), from which it may be gathered as a rule, though not thence for the first time, that where the will does not contain any direction by the testator that his estate shall be converted, and does contain a gift not specific of a subject in its nature perishable, the Court will cause the estate to be converted and invested, so that tenants for life may receive the income during their lives, and the persons entitled in remainder may enjoy the investment after them. And that this is the universal, well-established rule in all cases to which, upon the true construction of the will, it is applicable, cannot be questioned. But it is not less clearly established that neither this nor any other rule can be resorted to which would be at variance with the intention of the testator. In *Howe* v. *Lord Dartmouth* there was no intention expressed in the will, which contained only a general bequest of personal estate. A part of the property so generally bequeathed consisted of long annuities and bank stock, the one of a nature subject to exhaustion by lapse of time, the other exposed to the incidents and hazards of a trading company. There was no direction to the executors to convert. The Court could find nothing in the will there but an intention that the property should be enjoyed by the persons named, in succession. To effectuate this intention, to secure a present interest for the tenants for life, and at the same time not to leave the persons entitled in succession without the right to succeed to that which the testator had described and dealt with as one entire subject—however various might be the particulars of which it was composed, the Court thought it right to direct the conversion of the long annuities and the bank stock, merely because that was the only way in which the intention of the testator could be fulfilled.

(1) 7 Ves. 137.

Among the cases cited an behalf of the Plaintiff, *Morgan* v. *Morgan* (1) was much relied on. In that case a testator made a general bequest of his personal estate and effects whatsoever and wheresoever to trustees, upon trust to pay his debts and legacies—which general estate, and the interest, dividends, and annual proceeds arising therefrom, he directed that his executors should stand possessed of upon the trusts afterwards declared. He then gave specifically a certain real estate to be enjoyed by his wife for her life, directed it to be sold after her death, and then directed the proceeds of the sale and all the personal estate thereinbefore bequeathed to be divided equally between his children. A general decree for administration was made, by which a small sum of long annuities was ordered to be paid into Court, and under which some leasehold parts of the estate were sold. The question before the Master of the Rolls arose upon a claim made by the widow to retain the rents of the leaseholds which had been received by her up to the time when they were sold, and to enjoy the leaseholds and the long annuities in specie for her life. The Master of the Rolls in deciding that case referred to the rule in *Howe* v. *Lord Dartmouth* (2), and noticing that the effect of the later authorities had been to allow small indications of intention to prevent the application of the rule, said (3): "The question here is one of construction whether the testator has, in this will, expressed his intention that this rule shall not apply to this particular case." And he decided that the widow was not entitled to the leaseholds and the long annuities in specie. But that he did this upon the rule in *Howe* v. *Lord Dartmouth* is apparent; for, referring to portions of the will, he says expressly (4): "The rest of the will confirms my opinion that the testator had not supposed the whole of his property was to remain unconverted:" for that it would be the duty of the executor to sell some part of his estate to pay his debts and legacies; and he says, "If a part was to be sold, why not the whole?" And referring to the executors' power to vary securities, he thought that inconsistent with any intention by the testator that his widow should enjoy the long annuities in specie, since, as

(1) 14 Beav. 72.
(2) 7 Ves. 137.
(3) 14 Beav. 82.
(4) Ibid. 84.

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his executors might have lawfully sold the annuities, such intention would, if they had done so, been defeated.

It had been decided in *Gibson* v. *Bott* (1), that where the will contained a direction to convert, all intention that the legatee for life should enjoy in specie was dispelled. And indeed it is difficult to conceive a case in which any other conclusion could be arrived at. Certainly in none of the cases referred to has there been any decision in favour of enjoyment in specie, where there has been a direction to convert. And this makes it unnecessary for me to refer more particularly (with one exception) to the other cases which have been cited for the Plaintiff, although I have not failed to consider each of them. They were principally *Caldecott* v. *Caldecott* (2); *Meyer* v. *Simonsen* (3); *Re Llewellyn's Trusts* (4).

Nor does the case of *Brown* v. *Gellatly* (5), which is the exception I have mentioned, furnish an example to the contrary. Of all the authorities referred to by the Plaintiff's counsel, this was that upon which they most strongly relied, and which, as they argued, was a decision directly supporting their contention. In that case the testator left all his property, personal or freehold, of whatever description, to his executors, giving them "full power to realize the same when and in such manner as they may see fit without being personally responsible for such realization, to sail my ships for the benefit of my estate until they can be satisfactorily sold, and, without being responsible for any loss on any voyage, to sell the ships by public or private sale" for the purposes mentioned in the will, which then proceeded to give life interests and other interests in various parts of the property thus bequeathed as an entire and substantive thing.

An argument was raised on behalf of the tenants for life of the testator's residuary estate, who claimed to be entitled to the earnings of the ships for so long as the sale of them should be postponed. Now, the decision pronounced by the present Lord Chancellor went directly to the point; and I need not say that it is to be regarded as not only a clear, but an authoritative and

(1) 7 Ves. 89.
(2) 1 Y. & C. Ch. 312.
(3) 5 De G. & Sm. 723.
(4) 29 Beav. 171.
(5) Law Rep. 2 Ch. 751.

binding exposition of the law upon the subject then before him. His Lordship, referring to the case of *Green* v. *Britten* (1), in which the executors had been, in express terms, prohibited from converting certain ships there mentioned for seven years, and where, therefore, the Court held that to be a sufficient warrant for giving to the tenant for life the income which the ships earned during the seven years, said that the principle on which the Court there proceeded did not apply to the case before him, in which he found no indication whatever of an intention that the ships were to remain unconverted for any specific time. The decision, therefore, was that a value must be set upon the ships as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of such property must, of course, be invested, and become part of the estate.

I am wholly unable to perceive how this decision, clear and distinct as it is in its terms, and irrefragable in the principles on which it proceeds, can support or assist the Plaintiff's contention. It is a decision upon the construction of the will—it is founded upon the will, and upon the intention of the testator expressed in the will. The conversion of the entire estate is stated and treated in the judgment as a duty incumbent on the executors; the period of the conversion of so much of the estate as consisted of the ships is postponed for obvious reasons—to sell them at once would, in the testator's opinion, be disadvantageous; to keep them unemployed would, perhaps, having regard to the nature of the subject, be injurious, would certainly be expensive—to sail them until a suitable opportunity for selling them should arise, was the proper mode of managing this description of property, and directions to that end are therefore given, but given in such a manner as does not sever the ships and their earnings from the bulk of the estate, for they are to be sailed "for the benefit of my estate." No notion of the rule in *Howe* v. *Lord Dartmouth* (2) seems to have been entertained by the Lord Chancellor (the case does not appear from the report to have been referred to in the argument), but the decision proceeded upon the plain words of the will, by which the interest of the tenant for life was no more than the income of the estate, which estate was to be augmented by the earnings

(1) 1 D. J. & S. 649.

(2) 7 Ves. 137.

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of the ships until the executors should add those earnings, together with the proceeds of the sale when they thought fit to make it, to the aggregate amount of the general estate. Unless, therefore, it can be held that, upon the true construction of the present will, there is to be found a general direction, or an unequivocal intention, on the part of the testator, that his personal estate unconverted at his death should be converted, the case of *Brown* v. *Gellatly* (1) does not appear to me to furnish any authority in support of the Plaintiff's contention. Whether any such intention can be collected from the will itself is the matter to be considered.

In almost all—if not in all—the cases in which the point has arisen since the decision in *Howe* v. *Lord Dartmouth* (2), the Court, keeping in view the rule there applied, and not intending to question or depart from it, has held that it cannot be resorted to if there can be found in the will any indications of a contrary intention; and this latter principle is not less generally recognised, nor less firmly established, than the rule referred to. On the part of the Defendants, reference has been made to many cases in which the construction of wills, and the interests of tenants for life, and persons entitled in succession, being in question, the Court has been enabled to avoid the application of the rule. In *Alcock* v. *Sloper* (3), where the testator had given the residue of his real and personal estate to trustees upon trust to permit his wife "to receive the rents, profits, dividends, and annual proceeds thereof" for life, and had directed the trustees from and immediately after her decease to sell his freehold and leasehold houses by auction, desiring that a person named be employed as auctioneer, "to convert the whole of my estate and effects into money, and to distribute the same in equal shares," it was held by Sir *John Leach* that the widow was entitled, during her life, to the enjoyment of a part of the testator's estate, consisting of long annuities. The Master of the Rolls, adopting the principle to which I have referred, although he fully recognised the rule and the authority of *Howe* v. *Lord Dartmouth*, and the intention which had there been imputed to the testator, said (4): "Although this intention of the

(1) Law Rep. 2 Ch. 751.
(2) 7 Ves. 137.
(3) 2 My. & K. 699.
(4) Ibid. 702.

testator is *primâ facie* to be inferred, it may plainly appear upon the whole context of the will that the testator had not that meaning, but that his intention was that the tenant for life should derive the same income from the residuary estate as he had himself derived from his property up to the period of his death."

In *Bethune* v. *Kennedy* (1) Sir *C. Pepys*, in dealing with the case which, as he says, was distinguishable from *Alcock* v. *Sloper* (2), and which was in its facts by no means similar to the present, being, nevertheless, a question between tenant for life and the persons entitled in succession, said: "The question is plainly one of intention, to be collected from a careful examination of the whole scope and context of the instrument; and so it has always been considered."

In *Pickering* v. *Pickering* (3) the same Judge had to deal with a similar question, arising, however, out of much more complicated circumstances, into which it is not for the present purpose necessary to enter. The value of the case, however, is that it contains an exposition of the principles which ought to guide Courts of Equity in dealing with such questions.

In *Burton* v. *Mount* (4) the testator's estate, consisting partly of leasehold estates and long annuities, had been bequeathed upon trust to pay the rents and profits, dividends and interest, to a tenant for life, with trusts in remainder, and with power to the trustees to sell as they should think fit. The Vice-Chancellor *Knight Bruce* (5), observing that the will in that case differed from each of the wills considered in the cases of *Alcock* v. *Sloper*, *Collins* v. *Collins* (6), *Bethune* v. *Kennedy*, and *Pickering* v. *Pickering*, said: "The question is not upon the letter, however, but upon the spirit; the question is, whether, looking at those four cases together, they do not, in spirit, give a rule of construction, within the influence of which the present will does, as to the long annuities, fall; and I think they do." He declined to act on what, he said, would probably have been his own opinion—independently of authority, as to the long annuities—because he should be contradicting those decisions in their spirit. He therefore decided

(1) 1 My. & Cr. 114.
(2) 2 My. & K. 699.
(3) 4 My. & Cr. 289.
(4) 2 De G. & Sm. 383.
(5) Ibid. 388.
(6) 2 My. & K. 703.

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the point, as to the long annuities as well as the leaseholds, in favour of the tenant for life.

In *Hinves* v. *Hinves* (1) the Vice-Chancellor *Wigram* comments upon and explains the law, as it had been decided in *Howe* v. *Lord Dartmouth* (2) and in *Pickering* v. *Pickering* (3), and says: "But, if the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply. The rule is settled with sufficient clearness; the difficulty arises only in its application to particular cases, where the intention of the testator is expressed with more or less distinctness." He says, further, that "in the more modern cases, the Court, in applying the rule, has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded." After examining those modern cases to which he had referred, and observing that in the case before him the gift was of the testator's property generally—no specification of particulars—and the property thus generally described was to go to persons in succession, he says: "Stopping here, there is no doubt that the rule of the Court would require conversion; and the inquiry must be, whether, in the directions he has given for the enjoyment of his property by the *cestuis que trust*, or in the management of it by his trustees, there is anything which a conversion at his death would defeat." And, having pursued a minute and critical examination of the language of the will, he came to the conclusion that he could not hold that the long annuities and the leaseholds (the subject of the suit before him) were not to be enjoyed in specie, without in effect deciding against the cases to which he had referred.

There have been several other cases in which the law as decided in that I have last mentioned has been adopted. Several of them have been referred to in the course of the argument; but it does not appear to me to be necessary that I should mention them more particularly, for in none of them are the rules of law, and the principles upon which those rules are to be applied, expressed with greater clearness and force.

(1) 3 Hare, 609, 611, 612, 613. (2) 7 Ves. 137.
(3) 4 My. & Cr. 289.

Following, therefore, those rules, and guided by those principles, I proceed to examine the terms of a will made by a man apparently of great wealth, and part of whose property consisted of leaseholds worth more than £17,000, by means of which he had carried on the business of extensive collieries, in which he had laid out more than other £17,000 in the purchase of the chattels by which that business was carried on, from which he had derived a considerable income, which business he was carrying on at the time of his death, and for the continuance of which he carefully provided by the appointment of trustees with very ample powers for that purpose, and for that purpose only. Besides the general devise of all his real estate, he gives all his personal estate, including specifically and by name, his "leaseholds" and his "chattels and credits," to trustees, upon trust as to one-half for his daughter Mrs. *Thursby*, and as to the other half for his only other child, Lady *Scarlett*, for their respective lives, with this difference only, that as to Mrs. *Thursby* the gift was not to her separate use, but the same moiety was given to her husband for life in case he should survive, while as to Lady *Scarlett*, then a spinster, trusts for her separate use were declared, with power to her to appoint any part not exceeding one-half of "the rents, issues, and profits, interest, dividends, and annual income" for her husband for life in case he should survive her.

Pausing here for a moment, I see no reason to doubt that the testator has given his leaseholds, and the chattels appurtenant to those leaseholds, to be enjoyed by his daughters in specie, and exactly in the same manner and to the same extent as he had himself enjoyed them. The introduction of trustees cannot alter or affect this bequest, although the reason for their introduction is plainly apparent, not only because of the sex of the legatees, and the circumstance that one of them was then unmarried, but because the enjoyment of the mines in specie would be most conveniently effected, with regard to their interests and to the interests of the persons entitled in succession, by the trustees named. But the intention of the testator appears more plain when it is found that, as to this leasehold property, which did unquestionably comprise the collieries, power is given to the trustees, "in case they shall deem it beneficial so to do, to con-

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duct, carry on, and continue the collieries which I am possessed of, and either to increase or to abridge the business thereof, and all losses, costs, charges, and expenses of carrying on and continuing the said business shall be borne, paid, and defrayed out of my real and personal estate; and also to procure any lease or leases of the said collieries to be renewed to them, and also to continue the business thereof after such renewal." It has been argued for the Plaintiff that the expression, "in case they shall deem it beneficial so to do," brings this case within the decision in *Brown* v. *Gellatly* (1). In my opinion it can have no such effect, for, as I have said, there was in that case a plain duty incumbent on the executors to convert, and although a provision was given to effect the conversion with such caution as one particular subject required, the delay which might ensue and its fruits were declared to be "for the benefit of my estate." It is, in my opinion, clear that by this provision the testator had no intention of diminishing the extent of that enjoyment by his daughters of all his property which in the previous parts of his will he had conferred upon them. It would, I think, be doing violence to plain words—I had almost said the common sense—to hold otherwise. Not only has he not said so, but the whole context of the will leads to a contrary conclusion. I have, therefore, no doubt that the trustees, in exercising their discretionary power as to these leasehold mines, were to consider what was for the benefit of the owners, tenants for life, of these mines. If the trustees had thought fit to let these mines, as under the leasing power in the will they might have done (for I cannot restrict that power to leases of real estate or to husbandry leases, as I was invited to do, without inserting a qualification not to be found in the will), the tenants for life would have been entitled to the rents reserved upon any such leases. And although I arrive at this conclusion from the legal effect of the terms in the will, it may also be observed that the power of appointment reserved to Lady *Scarlett* to appoint in favour of a husband expressly mentions "rents" and "profits" as well as all the other income of the trust estate.

If it had been the intention of the testator that his leasehold mines were to be carried on by his trustees so that they might

(1) Law Rep. 2 Ch. 751.

annually, or periodically, invest the aggregate amount of the profits they made, and pay to the tenants for life the interest of such investments, it might have been expected that in a will which appears not to have been made without legal advice and assistance, there would have been some such provision, or at least some indication of such an intention. It would, no doubt, be unsafe to rest the decision of this case upon the ground of such silence or omission, but it is, nevertheless, a matter not to be disregarded in construing the will, where it is the duty of the Court to consider whether or not the whole scope and context of the instrument does express an intention by the testator that the tenants for life should enjoy in specie that property which was his at the date of the will. There are, however, in my opinion, other indications which lead irresistibly to the conclusion that I should be acting in direct contradiction to the intentions of the testator, as they are expressed and indicated by his will, if I were not to hold that, upon the reasonable and true construction, it was not his intention that his daughters should derive the same income from his estate as he had himself derived from his property up to the period of his death. If I did not, I must wholly disregard those directions to the trustees respecting their management of his property, which I find so carefully prescribed by the will. I should be violating the letter, not less than the spirit of the instrument, and should be acting in contradiction to the authorities I have referred to, and I should be making a will for the testator wholly different from that by which he thought and intended that he had provided for the enjoyment of his property by his daughters during their lives, and for the persons who might become entitled to that property in succession, in the same manner as he had enjoyed and would, if his life had been prolonged, have continued to enjoy it, with all the benefits and advantages that might accrue from that mode of management for which he had carefully provided.

I am of opinion, therefore, that the contention of the Plaintiff wholly fails, and that the Plaintiff's claim to reduce the extent of the enjoyment by the tenants for life cannot be supported, having regard to the true construction of the will.

The decree contained a declaration that the whole of the collieries acquired by the trustees of the will formed part of the testator's estate: And a declaration

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that the tenants for life were and are entitled to receive the rents and profits of the collieries in specie.

Solicitors for the Plaintiff: Messrs. *Shaw & Tremellen.*

Solicitors for the Defendants: Messrs. *Warry, Robins, & Burges;* Messrs. *Barlow, Bowling, & Williams,* agents for Messrs. *Artindale & Artindale, Burnley;* Messrs. *Lee & Houseman.*

V.-C. B. 1875 *Feb.* 13.

In re STEAM STOKER COMPANY.

Company—Winding-up Petition—Statement in Petition that Petitioner had not paid Calls—Demurrable Petition—Offers of Payment not amounting to Tenders.

Ch D. 41
Ch R 606

A Petition for winding up a company stated that a call had been made upon the Petitioner, which he had not yet paid, for reasons which he stated, but that he was willing to set apart, secure, or pay the amount in such manner as to the Court might seem just:—

Held (following the decision in *In re European Life Assurance Society* (1)), that the Petition was unsustainable on the face of it, and must be dismissed.

From the evidence it appeared that, the Petition having been presented on the 2nd of February, and answered on the 3rd for hearing on the 13th, the Petitioner's solicitor, on the 3rd, wrote to the secretary of the company stating that he had presented the Petition, and offering at once to pay the amount of the call if the directors would give an undertaking not to deal with the money until after the result of the Petition was seen. This offer having been by letter on the 11th declined, on the 12th the Petitioner's solicitor tendered to the company's solicitors a cheque on his own bankers for the amount of the call and interest, and informed him that the company's costs would be paid when ascertained:—

Held, that neither of these offers amounted to a legal tender, or satisfied the Petitioner's default.

The Petition being in the position of a bill that is demurrable, the costs of the Respondents' affidavits in opposition were not allowed.

PETITION.

The *Steam Stoker Company, Limited,* was incorporated by registration on the 31st of July, 1872, with a capital of £130,000, in 13,000 shares of £10 each.

(1) Law Rep. 10 Eq. 403.

The Petitioner, *Frederick Arthur Clark*, applied for 100 shares, and paid £100 on them, being the required amount of £1 per share on application. On the 28th of January, 1873, 100 shares were allotted to him, and he subsequently paid to the company £300, being £3 per share on the number so allotted.

The Petition stated the above facts, amongst others, and then proceeded to state and allege as follows:—

"11. On or about the 16th day of May, 1874, the directors made a call of £3 per share. Your Petitioner first neglected or refused to pay this call, believing that, from the condition of the company disclosed as aforesaid, any further capital paid up would be totally lost; but, the directors having commenced legal proceedings against him, and he having been advised that he had no valid defence, he, in or about the month of July, 1874, paid the said call of £3 on his said 100 shares, thus making the total sum paid by him £700."

"12. On or about the day of , 1874, a further call of £3 per share, being the whole of the capital remaining unpaid, was made by the directors, which your Petitioner has not yet paid. But your Petitioner has only withheld payment on the ground that the same, if paid up, is certain to be wasted and lost as the previous £7 per share has been, and he is willing to set apart and secure or pay the said last-mentioned call, amounting on his shares to £300, in such manner as to this Honourable Court may seem just."

The Petition prayed for the usual winding-up order.

This Petition was presented on the 2nd of February, and gazetted and served on the 5th, the hearing being ordered for the 13th.

In an affidavit filed on the 13th of February, the Petitioner's solicitor said that on the 3rd he wrote to the secretary of the company as follows:—"I have presented a Petition to wind up this company. You are no doubt well aware that my clients are able to pay, and have only declined paying the calls because they thought that the directors ought not to have proceeded with the company, and they consider that in paying calls they are only throwing their money away. These being their views, I am prepared at

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once to pay the amount of their calls, so as to avoid further expense, if the directors will give me an undertaking not to deal with the money until after the result of the Petition is seen, when, if an order is made, their moneys will be applied by the Court in due course of administration, and if not, then the directors will be held to have been legally entitled to make the calls to continue the company, and therefore to deal with my clients' money."

To this letter an answer from the company's solicitors, dated the 11th, was received on the 12th, in which they said they saw no reason why they should give such undertaking as had been mentioned.

In reply, the Petitioner's solicitor wrote on the 12th as follows:—"If you will let me know the amount of calls and interest, I will send you a cheque therefor, but in sending a cheque for the amount, I wish to call your special attention to sect. 153 of the *Companies Act*, 1862, which makes void all dispositions of the property of the company after the commencement of the winding-up, and in the event of an order being made on any petition, if the company has made any disposition of the said money or any portion of it, so that the same cannot be applied in due course of administration, my client will take steps to hold the directors liable for any loss that the assets of the company may suffer in consequence thereof."

On the 12th a summons was taken out to shew cause why, upon payment of the debt, with costs, all further proceedings in an action which the company had commenced for payment of the call should not be stayed, and on that day a clerk of the Petitioner's solicitor called upon the company's solicitors, and upon their refusing to consent to an order on the summons, he (the clerk) tendered to a clerk of the company's solicitors a cheque drawn by the Petitioner's solicitor upon his own bankers, and made payable to the company, for the amount of the call, and interest; and informed the clerk that the company's costs in the action would be paid when the Petitioner's solicitor knew the amount thereof; but the clerk of the company's solicitors refused to take the cheque.

Mr. *Jackson*, Q.C., and Mr. *Brooksbank*, for the Petitioner, asked

that the Petition might stand over to answer an affidavit; but upon the Respondents offering to withdraw the affidavit, the hearing was allowed to proceed.

Mr. *Swanston*, Q.C., for certain shareholders, opposed:—

The Petition states that calls are due from the Petitioner. It is, on this ground alone, unsustainable: *In re European Assurance Society* (1). To use an expression which is now familiar, it is a demurrable Petition.

Mr. *Eddis*, Q.C., and Mr. *Lawson*, and Mr. *E. Cutler*, for other shareholders; and Mr. *Kay*, Q.C., and Mr. *Romer*, for the company, also opposed.

They referred to *In re Star and Garter, Limited*, before Vice-Chancellor Bacon, March 18, 1873, in which the Court refused to make any order on such a petition, except that the Petitioner pay the costs other than those of Respondents' affidavits.

Mr. *Jackson*, in reply:—

The Petition states a tender made by the solicitor in a letter of the 3rd of February, and since that there has been a direct offer to pay these calls and the interest by means of a cheque of the solicitor on his own bankers.

[The VICE-CHANCELLOR:—A solicitor who offers to pay his client's debt by his own cheque does not make a tender.]

The so-called condition annexed to the tender of the 3rd of February was only an indication to the company to do that which, with reference to the 153rd section, it was their duty to do; as was further pointed out by the letter of the 12th.

If the second offer did not amount to a strictly legal tender, it removed the Petitioner's default; the only reason why it was not made before being the delay of the secretary in answering the letter of the 3rd.

SIR JAMES BACON, V.C.:—

The first thing I have to consider is, whether it is a matter of

(1) Law Rep. 10 Eq. 403.

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right on the part of the Petitioner that this Petition shall stand over because he has not had time to meet the evidence on the other side. Now everybody knows that it is the constant practice of the Court to allow this; and if that were all, the adjournment of the hearing would follow as a matter of course. But is it of course that I can take away from the Respondents the right which they have to demur to this Petition? It is their right to say that the Petition affords materials upon which alone the Court is bound to decide. What they say is, "Lay the affidavits aside, read only the statements in the Petition itself, and upon those statements alone, we maintain that this Petition is unsustainable." That is the proposition, or rather the statement, which I have to consider.

Now upon this point the authority of Lord Justice *James* is undisputed, and it is most directly in point.

Mr. *Jackson* says I am not bound by the Lord Justice's decision when he was Vice-Chancellor. Nothing can be more clear than that I am not so bound; but I am justified in following that decision if my judgment goes along with it, and in my opinion a more wholesome rule has never been laid down, or one more useful in checking the abuses which might otherwise spring up under colour of these Acts. If it were otherwise, the moment a shareholder, or it may be 100 shareholders, were called upon by the company to pay up on their shares, it might be competent for each of them to file a petition, for the purpose of staving off a payment which he was called upon presently to make. It would be an instrument of effectual ruin to companies if shareholders who owed the company money by not having paid their calls were allowed to come into Court with winding-up petitions. In my opinion, the decision of the Lord Justice when Vice-Chancellor was a right one in principle, and if he had not so ruled, I should have decided this case mainly on a similar view of the statements in the Petition.

Now what is the present Petition? It is the Petition of a shareholder who first compels the company to bring an action against him for a call, and then, when another call is made upon him, enters into a correspondence with the company, and finally makes a tender, but accompanied by a condition that the directors will

not deal with the money till after the result of the Petition is seen—a thing in itself most unreasonable. This was a condition which, in my opinion, the shareholder had no right to impose, and which takes away the appearance of anything like good faith on his part, for it was the duty of the directors to employ the money in the best way they could for the benefit of the company; and the very existence of the company might have been—I do not say that it would have been—dependent on their getting this money.

The second offer was even more absurd and unreasonable than the first. [His Honour read from the affidavit the account of the transaction on the 12th of February, the effect of which is given above, and continued:—] Now that is called a tender. The solicitor offers his cheque on his own bankers, and that is called a tender of money. Does that remove the objection which has been taken? I think it does not; and accordingly when we come back to the objection, it is this: "You, the Petitioner, upon your own shewing, can have no order." The Lord Justice, when Vice-Chancellor, established the rule, and nothing can be more clear, both upon the authority of that case and upon the character of the Joint Stock Companies Acts, than that it is incumbent on the Court not to encourage petitions by shareholders who are themselves in default to the company.

Upon the preliminary objection, therefore, it is my duty to order that this Petition be dismissed. It follows that the affidavits which have been filed in opposition are useless. The objection is in its true sense a demurrer to the Petition. Supposing every line and letter of the Petition to be true, it is unsustainable, and one sees at once how serious an evil such a practice as this might become.

The Petition must be dismissed with costs, not including the costs of the affidavits filed by the Respondents. I allow the shareholders their costs of appearance; that I think is right, giving them one set of costs; all I exclude is the Respondents' costs of their own affidavits.

Solicitor for the Petitioner: Mr. *A. Pulbrook.*

Solicitors for the Respondents: Messrs. *Gover & Norton;* Mr. *J. H. Kays;* Messrs. *Redpath & Holdsworth;* Messrs. *Vallance & Vallance.*

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POWELL *v.* POWELL.

[1873 P. 198.]

Vendor and Purchaser—Condition of Sale—Sale under the Court—Rescinding Contract—Return of Deposit—Dividends produced by Invested Deposit.

A sale in Chambers under a decree in a partition suit having been declared invalid on the ground that the sale took place before the certificate in answer to the inquiries directed by the decree was made :—

Held, that the vendors could not avail themselves of a condition enabling them if unwilling, or unable for any reasonable cause to remove or comply with any objection or requisition by a purchaser, to rescind on repayment of the deposit without interest and without costs on either side ; and that the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into Court and invested, with the dividends thereon, or the actual amount of deposit and the produce ; with costs, charges, and expenses.

ADJOURNED summons on behalf of Mr. *Bevan*, who had been declared to be a purchaser under a sale conditionally directed by the decree made in a partition suit, that he might be discharged from his purchase, and have the deposit returned, with interest at 4 per cent. from the 6th of June, 1874, and payment of the costs, charges, and expenses occasioned by his bidding for and being allowed the purchaser of the said hereditaments.

The property in question was put up for sale, with the sanction of the Chief Clerk, on the 5th of June, 1874, and the applicant, Mr. *Bevan*, became the purchaser of a portion of it, and paid a deposit of £907.

In the case of Mr. *Umfreville*, the purchaser at the same time of another portion, it had been held that the sale, though made under the direction of the Chief Clerk, was invalid from having been made before the approval and filing, on the 6th of August, 1874, of the certificate in answer to the inquiries directed by the decree : *Powell* v. *Powell* (1).

The question upon the present summons was, upon what terms the purchaser was entitled to be discharged from his purchase.

It appeared that in the course of the correspondence upon the

(1) Law Rep. 10 Ch. 130.

title Mr. *Bevan's* solicitor took the objection that it was indispensably necessary that the decree should be served upon two persons beneficially interested who were not before the Court, and that an order of the Court must afterwards be obtained confirming the sale which took place in their absence. To this the vendors replied that the objection was answered by the Court having by its express order dispensed with service of the decree on the two absent beneficiaries: *Powell* v. *Powell* (1).

The 18th condition of sale, under which the property was put up for sale, was as follows:—

"If any purchaser shall make any objection or requisition which the vendors shall be unable or unwilling for any reasonable cause to remove or comply with, the vendors shall be at liberty, with the leave of the Judge, and notwithstanding any intermediate negotiation or attempt to remove or comply with such objection or requisition, to cancel the contract, which shall thereupon be delivered up, and the deposit returned without interest and without costs on either side."

The deposit-money (£907) paid by Mr. *Bevan* on the 6th of June, 1874, had been paid into Court and invested.

Mr. *Kay*, Q.C., and Mr. *Method*, for the purchaser:—

Up to the time when, by the order of the Court of Appeal, made on the 14th of December, 1874, Mr. *Umfreville*, the purchaser of one of the other lots, was discharged from his purchase, the vendors always repudiated as invalid the objections to the validity of the attempted sale taken on behalf of Mr. *Bevan*, and called upon him to complete his purchase. They have not brought themselves within the terms of the 18th condition, as they have not given notice to rescind or cancel the contract, nor offered to return the deposit, nor obtained leave from the Judge to cancel the contract, and according to the usual practice the purchaser is entitled to his deposit, with interest thereon from the time it was paid, and his costs, charges, and expenses (according to the form given in *Seton* (2)). The vendors cannot avail themselves of a condition framed in these terms for the purpose of getting rid of

(1) Law Rep. 10 Ch. 130. (2) Page 1208.

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the duty which attached to them on the rest of their contract: *Dart's* Vendors and Purchasers (1); and in any case, if they wished to avail themselves of the condition, they should, as soon as this objection, which they were unable to remove, was taken at once have obtained leave from the Judge to cancel the contract: *Morley* v. *Cook* (2); *Engel* v. *Fitch* (3); *Godwin* v. *Francis* (4); *Greaves* v. *Wilson* (5); *Gardom* v. *Lee* (6); *Webb* v. *Kirby* (7); *Berry* v. *Gibbons* (8).

[As to the right to interest, they referred to *Sug.* Vend. and Pur. (9), and as to rescinding the contract, *Sug.* Vend. and Pur. (10).]

Mr. *Jackson*, Q.C., and Mr. *Horton Smith*, for the Plaintiffs:—

The only objection to the validity of the sale was, that by a slip in Chambers it was made too soon. The objection taken by the purchaser, that two persons beneficially interested were not before the Court, was withdrawn, or not pressed, after the reply of the vendors' solicitor, and therefore there has been nothing to preclude the vendors from claiming the benefit of the 18th condition, or to entitle the purchaser to anything more than the bare return of his deposit.

Either, as we say, the objection was one without substance, in which case the purchaser was not entitled on that ground to be discharged, and cannot claim anything in the shape of compensation; or if it was an objection of substance, then we claim the right to cancel the contract according to the 18th condition, and to return the purchaser his deposit without interest or costs. But even if the purchaser should be entitled to be discharged with costs, his claim for interest on the repaid deposit cannot be allowed: *Lachlan* v. *Reynolds* (11); *Calvert* v. *Godfrey* (12); *Perkins* v. *Ede* (13); *Seton* (14); *Dart's* Vendors and Purchasers (15).

Mr. *Kay*, in reply, referred to *Torrance* v. *Bolton* (16).

(1) 4th Ed. p. 146.
(2) 2 Hare, 106.
(3) Law Rep. 3 Q. B. 314.
(4) Ibid. 5 C. P. 295.
(5) 25 Beav. 290.
(6) 3 H. & C. 651.
(7) 7 D. M. & G. 376.
(8) Law Rep. 15 Eq. 150.
(9) 14th Ed. pp. 639, 641.
(10) Ibid. p. 242, *et seq.*
(11) Kay, 52.
(12) 6 Beav. 97.
(13) 16 Ibid. 193, 268.
(14) Page 1209.
(15) 4th Ed. p. 1096.
(16) Law Rep. 8 Ch. 118.

SIR JAMES BACON, V.C.:—

Knowing, as I now do, the facts of the case, I am very glad that the matter has come before me in Court, as when it was before me in Chambers I was under the impression that the 18th condition of sale applied. But that condition has nothing whatever to do with this case, and applies to a totally different state of circumstances. The vendor did not say he was unable to comply with or remove the objections to the title. He took no steps to rescind the contract. That he did not obtain the prior leave of the Judge for that purpose is not of much weight, but he made no application under the 18th condition to discharge the purchaser without interest and costs; and the purchaser was not here resisting any such application. This brings it to the ordinary case of a purchaser who, finding that he is entitled by law, on account of the invalidity of the proceedings in Chambers, to be discharged from his contract, is entitled on coming here to be reinstated in exactly the same position that he stood in when he attended the sale, and to be indemnified against all the expenses he has been put to. The deposit having been paid into Court and invested, he is entitled to have the Bank Annuities produced by the investment of the deposit (£907), and the dividends that have accrued thereon—not in the shape of interest, but on the ground that it is his own money, and that he is entitled to whatever it has produced. He will be allowed the costs, charges, expenses, &c. (following the terms of the order in *Seton* (1)).

If, however, he insists on the return of the money itself, he is entitled to it and to all the dividends which have arisen from its investment.

[Mr. *Bevan* elected to take the stock and dividends.]

MINUTE OF ORDER:—Upon the application, &c.;

This Court doth order that the said *Bevan* be discharged from being such purchaser. And it being agreed between the parties that the sum of £907, the deposit paid by the said *Bevan*, is now represented by £977 17*s.* 11*d.* New 3 per Cents, part of the £ like annuities in Court to the credit of this cause, &c., and that the October dividend on the said £977 17*s.* 11*d.* is now represented by

(1) Page 1208.

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£16 0*s.* 6*d.* like annuities, further part of the said £ ., It is ordered that £993 18*s.* 5*d.* like annuities (being the aggregate of the said sums of £977 17*s.* 11*d.* and £16 0*s.* 6*d.* like annuities), and any dividend to accrue thereon, be transferred and paid to the applicant *Bevan*, he by his counsel undertaking to pay to the Chancery broker the amount of the brokerage due on such transfer.

Tax the costs, charges, and expenses of *Bevan* occasioned by his bidding for and being allowed the purchaser of the said hereditaments, and of and incident to this application, and to include therein the amount which he shall pay for such brokerage. So much of £ , the residue of the said £ like annuities, as will raise the amount of the said costs, charges, and expenses when taxed, to be sold, and out of the money to arise from the said sale the said costs, charges, and expenses be paid to the applicant's solicitor. But such payment of costs is to be without prejudice to the question how the same shall ultimately be borne. Liberty to apply.

Solicitors: Mr. *T. Sismey;* Messrs. *Uptons & Co.*

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JONES *v.* NORTH.

[1875 J. 18.]

Injunction—Breach of Contract—Contract not to tender—Parties.

Tenders for the supply of stone having been invited by a corporation, it was agreed between *A.*, *B.*, *C.*, and *D.*, quarry owners, that *B.* should not tender, that *C.* and *D.* should tender above *A.*'s price, that *A.* should purchase certain quantities of stone from *B.*, *C.*, and *D.* at a fixed price, and that *B.*, *C.*, and *D.* should not supply the corporation with stone during 1875.

The stone was purchased, as agreed, by *A.*, but *B.*, in breach of the agreement, sent in a tender, which was accepted:—

Held, on demurrer, that the agreement was not void, and that a bill would lie by *A.* to restrain *B.* from supplying the corporation directly or indirectly during 1875 with stone, without making the corporation parties.

DEMURRER.

The statements in the bill were in effect as follows:—

On the 17th of December, 1874, the Corporation of *Birmingham* issued an advertisement inviting tenders for contracts for the supply of 40,000 tons of stone for macadamising the causeways of the borough. A form of specification of the work required to be performed, together with a form of tender, was also issued. The Plaintiff was the owner of the *Hailstone Quarry*, at *Rowley Regis*, in

Staffordshire, and his quarry furnished stone fit and proper for the purposes referred to in the specification. The Defendants (carrying on business as the *Rowley Hall Colliery Company*) were the owners of another quarry in the same district, also furnishing stone of a quality available for the purposes of the specification. Messrs. *Fitzmaurice & Co.* and *Palmer & Lee* were owners of other quarries in the neighbourhood of *Birmingham* furnishing stone available for the specification. When the specification and form of tender were issued, the price at which tenders should be sent in became a matter of serious moment to the Plaintiff, the Defendants, and the other two firms. Under these circumstances an arrangement was come to between the Plaintiff, the Defendants, *Fitzmaurice & Co.*, and *Palmer & Lee,* that the Plaintiff should purchase from the Defendants 10,000 tons of stone, and that in consideration of his doing so the Defendants should not send in any tender to the *Birmingham* Corporation, nor supply the corporation with any stone during 1875; and that the Plaintiff should also purchase from *Fitzmaurice & Co.* 10,000 tons, and from *Palmer & Lee* 6000 tons, and that the Plaintiff and the two last mentioned firms should each send in tenders at different prices, the prices named in the Plaintiff's tender being the lowest. In accordance with these arrangements the Plaintiff entered into contracts with the Defendants, and with *Fitzmaurice & Co.* and *Palmer & Lee,* to take the above-mentioned quantities of stone, 26,000 tons in all. In this way it was apprehended that the corporation (though not binding themselves to do so by the terms of the specification), would, in all probability, fix upon the lowest tender, and thus the 40,000 tons would be supplied by the Plaintiff, and through him by the contracting firms; the prices as between the Plaintiff and the other three firms for the quantities of stone to be furnished by them being so arranged as to secure to each of them a fair share of the profit arising from the supply to the corporation under their specification.

On the footing of the agreement, the Plaintiff, on the 30th of December, 1874, sent in a tender to the *Birmingham* Corporation for 40,000 tons of stone.

On the 27th of January, 1875, the Plaintiff received a note from an officer of the corporation that the Public Works Com-

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mittee had accepted the offer of the *Rowley Hall Company* (the Defendants) for the supply of stone,—in breach, as the bill alleged, of their contract with the Plaintiff, and notwithstanding the said agreements, and the heavy liability which the Plaintiff had thereby been induced to bring himself under as well to the Defendants as to *Fitzmaurice & Co.* and *Palmer & Lee* for the purchase of large quantities of broken stone, the purchase of which was wholly useless, and would, in fact, be a dead loss to the Plaintiff unless the agreement between himself and the Defendants be duly acted upon and observed.

Under these circumstances the Plaintiff had filed his bill against Messrs. *North & Wright* to restrain them from supplying any rough or broken *Rowley* ragstone to the *Birmingham* Corporation either directly or indirectly during 1875, and from supplying during such period any other stone or material, or doing any act, whereby the corporation might be supplied with stone in manner and for the purposes required and referred to in and by the specification.

To this bill the Defendants had demurred for want of equity.

Mr. *Jackson*, Q.C., and Mr. *E. Ward*, for the demurrer:—

1. The bill is demurrable for want of parties, as it seeks to prevent the Defendants from carrying out their contract with the corporation not before the Court, although the corporation will be seriously prejudiced if that contract be not carried out, and therefore are necessary parties to the suit.

2. The bill is demurrable also for want of equity, as the injunction, if granted, can in no way alter or improve Plaintiff's position by giving him the contract with the corporation, and the only result will be to subject the Defendants to pecuniary loss and liability with no corresponding benefit to the Plaintiff.

3. Admitting the truth of the arrangement between the Plaintiff and the other quarry owners, as averred in the bill, the Court will not give any assistance to a Plaintiff who does not come with clean hands, and seeks to enforce an arrangement which is against public policy, inasmuch as it is a device for compelling the corporation, under the fiction of a public competition, to accept tenders not representing the real market price of the commodity.

Mr. *Kay*, Q.C., and Mr. *Ince*, for the Plaintiff, were not called upon.

SIR JAMES BACON, V.C.:—

There is nothing to justify this demurrer. The case is very plain, and, on one side at least, a very honest one. Several gentlemen, who are owners of quarries, agree that they will sell to one of them a quantity of stone, in view of his tendering to the Corporation of *Birmingham* for what the corporation wants, and the present Defendants sell by the bought and sold note (which is set out) a quantity of stone to the Plaintiff. Upon it being pointed out to the Defendants that what is called the bought and sold note does not specify that they shall not supply the Corporation of *Birmingham*, they enter into a written engagement, which becomes part of the contract for the purchase and sale, that they will not supply the corporation during the year 1875. How are they to escape from that contract? Is there any ground on which this Court can withhold from the Plaintiff the protection to which that contract entitles him? I am aware of none. The grounds which have been argued first of all are that the corporation should be parties. Why? The corporation, whatever the form of the contract between them and the Defendants, could not enforce specific performance of it. If the Defendants so involved themselves as that they are unable to perform their contract with the corporation, the corporation require no assistance, and are entitled to none from this Court, because by an action at law they can at once inflict upon the Defendants the penalty which they have most justly incurred by entering into a contract with them totally in violation of the good faith which they owed to the Plaintiff. The suggestion that the Plaintiff's position would not be bettered by granting the injunction is one to which I cannot listen for a moment. The Plaintiff does not ask the Court to better his position. All that he asks is that the Defendants should not violate their plain contract to the Plaintiff's prejudice. What ground of demurrer can there be in that? The last point, which was touched faintly by Mr. *Jackson*, but enlarged upon by his junior, is, that the Plaintiff must come into Court with clean hands.

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Everybody will admit that cardinal rule, and in my opinion his hands are wholly unpolluted. It is perfectly lawful for the owners of three quarries to agree that they will sell their commodities upon terms suitable to themselves, and which they approve of; and although they know that the purchaser is going to supply, or offer to supply the Corporation of *Birmingham* with the commodity, that does not in the least restrict their right to deal *inter se*, nor does such dealing deserve to be characterised as a conspiracy. There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can. Upon no ground whatever, in my opinion, can this demurrer be sustained, and it must be overruled with costs.

Solicitors: Messrs. *Emmet & Son*, for Messrs. *Sanders & Smith*, *Birmingham*; Messrs. *Newman, Dale, & Stretton.*

V.-C. B. 1875 *Feb.* 20.

Ex parte MARY JAMESON.

Practice—Re-transfer of Stock transferred to National Debt Commissioners—Form of Order—National Debt Act, 1870 (33 & 34 *Vict. c.* 71), *ss.* 54, 55.

Where stock in the name of a trustee holding upon trust for a beneficiary has been transferred to the National Debt Commissioners, the re-transfer will be ordered to be made, not to the beneficiary, but to the trustee.

PETITION.

A few months after the birth, on the 15th of February, 1847, of *Isidora Mary*, daughter of *John* and *Mary Jameson*, a sum of £200 Reduced Annuities was transferred by *John Jameson* into the name of *John Sharpe*, to be held by him upon trusts alleged to be for *Isidora*, the infant child of the said *John Jameson*. *Sharpe* refused to accept the trusts, and the instrument declaring them was lost. Doubts had consequently been suggested whether there was not a resulting trust for *John Jameson* himself.

Isidora was the only child then living of *John Jameson*. Shortly after the transfer *John Jameson* became insane. *John Jameson* died in 1848, and *Isidora Jameson* in 1872, both intestate, and letters

of administration to the estates of both were granted to *Mary Jameson*, the widow and mother.

The widow presented the Petition, which was served on the Commissioners for the Reduction of the National Debt and the Attorney-General, and also upon *John Sharpe*, stating that no dividends had been received since 1847, and that in 1857 the stock was transferred to the account of the Commissioners for the Reduction of the National Debt, and praying that the costs of the Attorney-General, and the Commissioners, and *Sharpe* might be paid out of the stock, and the balance, with all dividends accrued due thereon, and the accumulations (if any) thereof, transferred and paid to the Petitioner.

On the 25th of July, 1874, an inquiry was directed as to who was or were entitled to the stock; and on the 30th of January, 1875, the Chief Clerk certified that *John Sharpe* was entitled to it as trustee for the Petitioner, the administratrix of *Isidora Jameson*.

The Petition coming on again,

Mr. *Cookson*, for the Petitioner, asked for the order as prayed, omitting the prayer for accumulations.

Mr. *Hemming*, for the National Debt Commissioners and the Attorney-General:—

The order ought to be in the usual form, which is to direct payment of the costs of the Attorney-General and the Commissioners, and upon such payment to order a transfer to the person who would have been legally entitled to the stock. This form has been settled for many years, and is given in *Seton* (1). There is a special reason why that form was adopted, because the Commissioners are liable to pay again if they should pay to the wrong person, even under the direction of the Court. The practice, therefore, is not to require them to transfer to any one but the person legally entitled, who in this case is *Sharpe*, and then only on first receiving their costs.

Strictly speaking, *Sharpe* ought to have been Petitioner.

Mr. *Osler*, for *Sharpe*, objected to being compelled to receive

(1) Page 1106.

(1) See order Reg. Lib. 24 July 1874 A. 2301. C
Seton 1511. No 1.

V.-C. B. 1875 *Ex parte* Mary Jameson.

and apply the fund, or to pay the costs in the first instance, stating that *Sharpe* had from the first refused to accept or act in the trust, and did not wish to have anything to do with it.

The Vice-Chancellor said that the order must be in the usual form, and made an order that the Petitioner do pay the costs of the Attorney-General and the Commissioners, and that upon payment of the said costs the Accountant-General or the Deputy Accountant-General, or the Secretary or Deputy or Assistant Secretary of the Bank do transfer the stock to *Sharpe* as trustee for the Petitioner, the administratrix of *Isidora Jameson;* and that the same officer should receive the dividends which had accrued due, and pay them to *Sharpe* as such trustee; and that *Sharpe* do be allowed to retain his costs as between solicitor and client out of the dividends, and transfer the stock, and pay the balance of the dividends to the Petitioner as such administratrix. (a)

Solicitors: Messrs. *Yarde & Loader;* Messrs. *Raven & Hare;* Mr. *W. Eley.*

(a) See order Reg. Lib. A. 1875 fol. 930 A

Ex parte DAWSON. *In re* DAWSON.

C. J. B.
1875
Feb. 15.

Voluntary Settlement by Trader—Invalidity—Retrospective Effect of Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 91—*Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 125—*Bankruptcy Repeal Act*, 1869 (32 & 33 *Vict. c.* 83), *ss.* 2, 20.

Sect. 91 of the *Bankruptcy Act*, 1869, applies to settlements executed before, as well as after, the Act came into operation.

The corresponding sect. 125 of the *Bankrupt Law Consolidation Act*, 1849, is entirely repealed by the *Bankruptcy Repeal Act*, 1869, and has no operation upon a settlement executed by a person who is adjudged a bankrupt after the *Bankruptcy Act*, 1869, came into operation, even though the settlement was executed before that Act came into operation.

THIS was an appeal from a decision of the Judge of the *Hull* County Court.

Duncan Dawson, a currier at *Hull*, filed a liquidation petition on the 29th of May, 1874, under which his creditors, on the 22nd of June, appointed a trustee. The debtor's statement shewed that his debts amounted to £35,250, and his assets to £5997. On the 27th of February, 1865, he had executed a post-nuptial voluntary settlement of some of his property upon his wife and his son. The trustee applied to the Court for an order declaring this settlement void as against him. The Judge declared the settlement to be void under sect. 91 of the *Bankruptcy Act*, 1869, as against the trustee in the liquidation, unless the parties claiming under the settlement could prove that the settlor was at the time of its execution able to pay all his debts without the aid of the property comprised in the settlement. The debtor's wife appealed.

Mr. *Spink* (solicitor), for the Appellant:—

Sect. 91 (1) is not retrospective in its operation. It is of a

(1) Sect. 91 provides: "Any settlement of property made by a trader, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the

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highly penal character, and it would be contrary to the common principle of construction of statutes to hold that it is retrospective, when it is not expressly made so.

It has been already decided in two County Courts that the section is not retrospective: *Re Tolley* (1); *Re Risdon* (2). The present case must be taken to be governed by the provisions of sect. 126 of the Act of 1849, for though that Act is repealed by the *Bankruptcy Repeal Act*, 1869, yet all previously existing rights are preserved by sect. 20 (3) of the latter Act.

The rights acquired under this settlement must be taken to have been preserved by sect. 20, and the burden of proving that the settlor was solvent at the time when he executed the settlement ought not to be thrown upon the parties claiming under it.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the trustee:—

Sect. 91 applies. It speaks of "any settlement *made*," not *which shall be made*. There is no limitation of the enactment to the case of a settlement executed after the Act came into operation. Sect. 126 of the Act of 1849 is not saved by sect. 20 of the repealing Act, and if there is no remedy under sect. 91 there is no remedy at all. That is a strong reason for construing sect. 91 retro-

bankrupt appointed under this Act, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee."

(1) 15 Sol. Jour. 116.

(2) 14 Sol. Jour. 376.

(3) Sect. 2: "This Act shall not come into operation until the day on which the *Bankruptcy Act*, 1869, comes into operation, which day is hereinafter referred to as the commencement of this Act."

Sect. 20 provides: "The enactments described in the schedule to this Act are hereby repealed" (the Act of 1849 is described in the schedule); "but this repeal shall not affect the past operation of any such enactment, or revive any Court, office, jurisdiction, authority, or thing abolished by any such enactment, or affect the validity or invalidity of anything done or suffered before the commencement of this Act, or any right, title, obligation, or liability accrued, or restriction imposed, before the commencement of this Act, by or under any such enactment . . . . nor shall this repeal interfere with the institution or prosecution of any proceeding in respect of any offence committed against, or any penalty or forfeiture incurred under, any enactment hereby repealed."

spectively. Acts of Parliament have often been so construed: *Freeman* v. *Moyes* (1).

Mr. *Spink*, in reply.

SIR JAMES BACON, C.J. :—

As to the legal point which has been argued, I have already said that in my opinion the 126th section of the Act of 1849 has nothing whatever to do with the case before me. That Act came to a total end when the *Bankruptcy Repeal Act* of 1869 was passed. The Act of 1849 is not only in express terms repealed, but in sect. 20 of the repealing Act there is not a word that can have any such extensive operation as has been suggested, because, although it does not affect the past operation of any repealed enactment, the enactment of sect. 126 does not make valid any such settlement; on the contrary, it makes it invalid. The statute is advisedly repealed, no part of it remains in existence, and, as a substitute for sect. 126, and to prevent any mischief which might arise from its repeal, by giving validity to things which were not in themselves either valid or to be approved of, there comes the 91st section of the Act of 1869, which applies to every settlement (with certain exceptions) which has been executed by a trader, whether when the Act of 1849 was in operation or since. Upon the law of the case it is, in my opinion, clear beyond all possibility of question that this settlement on the wife and son is invalid, and that the trustee is entitled to the property comprised in it, unless the parties claiming under the settlement can prove that the settlor was solvent, independently of this property, at the time when he executed it. It was the debtor's property, it was a settlement purely voluntary, as is admitted—a settlement which, as against him, no doubt might have some validity, but as against the trustee in the liquidation it has none.

I think that the judgment of the learned Judge of the County Court was right, and therefore this appeal must be dismissed, and with costs.

Solicitors for the Appellant: Messrs. *Walker & Spink, Hull.*

Solicitors for the Trustee: Messrs. *Chester, Urquhart, & Co.*, agents for Messrs. *Holden, Sons, & Hodgson, Hull.*

(1) 1 A. & E. 338.

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1875

Feb. 22.

Ex parte HALFORD. *In re* JACOBS.

Composition—Debt incurred by Fraud—Action by defrauded Creditor for Balance—Injunction—Jurisdiction of the Court of Bankruptcy—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 15—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

A creditor who alleges that his debt has been contracted fraudulently by his debtor may, after receiving a composition from him under sect. 126 of the *Bankruptcy Act*, 1869, commence an action against him for the balance of the debt, without being obliged to prove to the Court of Bankruptcy a *primâ facie* case of fraud.

The Court of Bankruptcy has no jurisdiction to interfere with such an action.

THIS was an appeal from a decision of the Judge of the *Derby* County Court.

On the 14th of July, 1874, *Benjamin Jacobs*, a clothier, at *Derby*, filed a liquidation petition, under which his creditors resolved, by the proper majority, to accept a composition of 10*s.* in the pound; and this resolution was duly confirmed. The composition was to be paid in instalments. Among the creditors were *Benjamin Halford* and two other persons, clothiers, in *London*, who traded as *Benjamin Hyam & Son*. They were creditors in respect of a bill of exchange for £33 3*s.* accepted by the debtor. They did not attend either of the meetings of the creditors, or vote upon the resolutions. The first instalment of the composition was paid to them when it became due. They afterwards commenced an action against *Jacobs* for £16 11*s.* 7*d.*, the balance of their debt beyond the amount of the composition, upon the ground that the debt had been contracted by means of fraud on the part of the debtor. *Jacobs* applied to the County Court for an order to restrain the Plaintiffs from proceeding with the action, on the ground that they were bound by the resolutions passed by the creditors. The Judge granted the injunction. *Hyam & Son* appealed.

Mr. *Roxburgh*, Q.C., and Mr. *I. M. Solomon*, for the Appellants:—

Sect. 15 (1) of the *Debtors Act*, 1869, gives us an absolute right to bring this action. The Court of Bankruptcy will not restrain an action brought by a creditor after he has received a composition where the question involved is one personal to the particular creditor: *Ex parte Paper Staining Company* (2).

Mr. *E. C. Willis*, for the debtor:—

Before bringing the action, the creditor ought to satisfy the Court of Bankruptcy that there is a *primâ facie* case of fraud. Moreover, all the other sections (except sect. 15) in part 2 of the *Debtors Act* relate to the punishment of fraudulent debtors criminally. It could not have been intended to give also a civil remedy.

SIR JAMES BACON, C.J.:—

This is a very plain case. The *Bankruptcy Act*, 1869, enables a debtor to get free from his debts by making an arrangement with his creditors under the provisions of sects. 125 and 126, which empower a certain majority of the creditors to bind the minority. The *Debtors Act* contains a plain enactment that, notwithstanding such an arrangement, any creditor, whose debt has been contracted fraudulently, and who has not assented to the arrangement otherwise than the present Appellants have done, may take proceedings against the debtor without reference to the *Bankruptcy Act*—proceedings over which the Court of Bankruptcy has no jurisdiction. The Judge of the County Court has no jurisdiction whatever over the proceedings of a creditor who makes the complaint which these Appellants make. They will have to prove to a jury that they are entitled to make it. If they fail to prove their case, they alone will suffer. The fact that there are other provisions in Part 2 of the *Debtors Act* for the punishment of fraudulent debtors criminally affords no argument against the application of the civil

(1) Section 15: "Where a debtor makes any arrangement or composition with his creditors under the provisions of the *Bankruptcy Act*, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof, before the date of the arrangement or composition, he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends."

(2) Law Rep. 8 Ch. 595.

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remedy given by sect. 15. The question may possibly arise hereafter, whether this debtor cannot be punished criminally for fraud, in addition to having to pay the balance of the debt beyond the amount of the composition. The order appealed from must be discharged.

Solicitors for the Appellants: Messrs. *G. & A. Lindo*, agents for Mr. *J. O. Jacobs, Derby.*

Solicitors for the debtor: Messrs. *Hand, Son, & Johnson*, agents for Mr. *W. Briggs, Derby.*

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Ex parte DAWES. *In re* HUSBAND.

Trader Debtor—Execution—Seizure and Sale—Notice of prior Act of Bankruptcy—Execution levied after Sale under prior Execution by the same Creditor—Bankruptcy Act, 1869, *ss.* 6 (*sub-s.* 5), 11, 87, 95.

A creditor issued execution against a trader for a debt above £50. After the goods seized by the sheriff had been sold, the same creditor issued another execution against the debtor for another debt above £50. The goods seized under the second execution were sold, and the money produced by the sale was paid over to the creditor, the sheriff having had no notice within fourteen days from the sale of any bankruptcy petition against the debtor. Afterwards the debtor was adjudicated a bankrupt upon the act of bankruptcy committed by the seizure and sale under the first execution. The money produced by the first sale was not paid to the creditor till after the sale under the second execution:—

Held, that, though it was not proved that the creditor had, when the sale took place under the second execution, any actual knowledge that the sale had been made under the first, he must be deemed to have had notice of the proceedings under his own execution, and must therefore refund the money produced by the second execution.

THIS was an appeal from a decision of the Judge of the *East Stonehouse* County Court.

Samuel Husband was a builder at *West Looe.* On the 3rd of September, 1873, *J. R. Bishop* recovered a judgment against him for £80 18*s.* 4*d.*, and issued a writ of execution, under which, on the 5th of September, 1873, the sheriff seized some goods of *Husband.* On the 17th of September the goods were sold, and on the 13th of October the proceeds of the sale were paid by the

sheriff to *Bishop*. On the 11th of September, 1873, *Bishop* recovered another judgment against *Husband* for £96. A writ of execution was issued, under which the sheriff, on the 23rd of September, seized other goods of *Husband*, and sold them on the 29th of September. On the 15th of October the proceeds of this sale, amounting to £33 13*s.* 4*d.*, were paid by the sheriff to *Bishop*. On the 21st of October, 1873, a bankruptcy petition was presented against *Husband*, the act of bankruptcy alleged being the levy by seizure and sale under *Bishop's* first execution. *Husband* was adjudicated a bankrupt on the 5th of November. The Judge refused an application made by the trustee for an order that *Bishop* should refund the £33 13*s.* 4*d.* The trustee appealed.

Mr. *Finlay Knight*, for the Appellant:—

Sect. 87 of the Act does not give to an execution creditor, who has been paid the fruits of his execution by the sheriff, a statutory title to hold them in every case; his right is liable to be defeated if he had at the time when he levied his execution notice of a prior act of bankruptcy committed by the debtor: *Bankruptcy Act*, 1869, ss. 11, 95; *Ex parte Villars* (1); *Ex parte Key* (2); *Slater* v. *Pinder* (3). Here the creditor must be taken to have had notice of the sale under his own first execution.

Mr. *Doria*, for the creditor:—

By sect. 11 of the Act the title of the trustee relates back to the completion of the act of bankruptcy upon which the adjudication is made. I contend that in this case the act of bankruptcy under the first execution was not completed till the money was paid to the creditor. I rely also on *Ex parte Villars* as shewing that, after a proper payment to the execution creditor by the sheriff more than fourteen days after the sale, the money can under no circumstances be recalled. Sect. 87 contains the whole code of bankruptcy law with respect to the execution creditors of traders where the debt is above £50.

But, at any rate, it must be shewn that the creditor had notice of the sale under the first execution, when the sale was made

(1) Law Rep. 9 Ch. 432. (2) Law Rep. 10 Eq. 432.
(3) Law Rep. 6 Ex. 228.

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under the second. Here there is nothing to shew that he had such notice, for the money was not paid to him till long after. The sheriff is not the agent of the execution creditor to receive notice of an act of bankruptcy committed by the debtor: *Ramsey* v. *Eaton* (1).

SIR JAMES BACON, C.J.:—

I think this case comes clearly within the provisions of the statute. The decision in *Ex parte Villars* will by no means bear the construction which Mr. *Doria* has sought to put upon it. No one can dispute that the head-note of the report of *Ex parte Villars* states the plain law on this subject. If an execution creditor, with no notice of any prior act of bankruptcy, levies upon his debtor's goods, and no bankruptcy petition of which the sheriff has notice is presented against the debtor within fourteen days after the sale of the goods seized, the creditor is entitled to the proceeds of the sale in satisfaction of his debt. But what resemblance has that to the case now before me? The law has been established in bankruptcy for many years that if an execution creditor has, before he levies his execution, notice of an act of bankruptcy committed by his debtor, he cannot maintain his execution as against the other creditors. That provision is re-enacted by the statute now in force. But to what end should notice of the act of bankruptcy have been given to the execution creditor in the present case? The notice could only have been this: You yourself have done that which constitutes the act of bankruptcy. A man requires no notice of that which he has done himself. It would be absurd to give it to him. Here the execution creditor can properly retain the proceeds of his first execution. But when, having sold the debtor's goods under the first execution on the 17th of September, he on the 23rd of September seized other goods of the debtor under the second execution for a debt of more than £50, he must have done so with notice of the prior act of bankruptcy, and the fruits of his second execution cannot be retained as against the other creditors. Sect. 11 of the Act must be read with reference to the preceding sections, and by sect. C, sub-sect. 5, the levy by seizure and sale of an execution for a deb

(1) 10 M. & W. 22.

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of £50 is the completion of an act of bankruptcy. The question is whether a creditor who had notice of a prior act of bankruptcy can retain the proceeds of his execution against the other creditors. That he should be able to do so would be against the spirit of the bankrupt law, as well as contrary to the very words of the Act. The order of the County Court must be reversed, and the money arising from the second execution must be refunded.

Solicitor for the Trustee: Mr. *G. H. Radford*, agent for Messrs. *Greenway & Adams, Plymouth.*

Solicitors for the Creditor: Messrs. *R. W. Childs & Batten*, agents for Messrs. *Childs & Son, Liskeard.*

Ex parte STEBBING. *In re* STEBBING.

C. J. B.
1875
March 8.

Adjudication of Bankruptcy—Notice to Debtor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71) *ss.* 8, 125—*Bankruptcy Rules*, 1870, *rr.* 61, 65, 266, 267.

An adjudication of bankruptcy made under the provisions of Rule 266 of the *Bankruptcy Rules*, 1870, must, like any other adjudication, be made upon a petition presented by a creditor, and after service of the petition upon the debtor in the ordinary way.

THIS was an appeal from an adjudication of bankruptcy made by the Registrar of the *Colchester* County Court, acting as Judge, against *George Hutley Stebbing.*

Stebbing was a cattle dealer at *Easthorpe.* On the 23rd of January, 1875, he filed a liquidation petition. On the 25th of January a receiver of his property was appointed, who took possession on the 26th of January. The first meeting of the creditors was held on the 13th of February, when it was resolved to adjourn the meeting to the 20th of February. On the 20th of February the creditors again resolved to adjourn the meeting to the 6th of March. On the 19th of February, a petition in bankruptcy was presented against *Stebbing* by the *London and County Banking Company.* The act of bankruptcy alleged was the filing of the liquidation petition. On the same day the Registrar made

C. J. B. 1875 *Ex parte* STEBBING. *In re* STEBBING.

an adjudication of bankruptcy against *Stebbing* on this petition. The bank had not proved their alleged debt by any evidence beyond the ordinary affidavit verifying the petition, and the adjudication was made without any service of the petition upon *Stebbing*. He was ignorant of its having been presented until the next day; when the bank, upon evidence that he was making away with his property, obtained a search warrant, under which the same evening a bailiff of the Court searched him, and took away from him some money and cheques. *Stebbing* appealed from the adjudication, and he filed an affidavit denying the allegations upon which the search warrant had been obtained.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

The Act of 1869 contemplates that an adjudication of bankruptcy shall always be made after notice of the petition to the debtor: sect. 8 and Rule 61 prescribe how service of the petition is to be effected. The only case in which an adjudication can be made in a summary way is under rule 65, when a trader is alleged to have committed an act of bankruptcy by departing from his house or otherwise absenting himself. But even then, if the debtor appears upon the hearing of the petition, he is entitled to have the case heard in the ordinary way: *Ex parte Lopez* (1).

Mr. *Finlay Knight*, for the bank:—

This adjudication was made under sect. 125 (sub-sect. 12), or under Rule 266 of the *Bankruptcy Rules*, 1870 (2). Bankruptcy was

(1) Law Rep. 6 Ch. 894.

(2) Sect. 125 (sub-sect. 12): "If it appear to the Court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

Rule 266. "Where proceedings have been instituted for liquidation or composition, the Court may adjudicate the debtor bankrupt if, in the opinion of the Court, the property of the debtor cannot be sufficiently protected by the exercise of the power hereinbefore given to restrain suits and actions, and the appointment of a receiver or manager; but in any such case all proceedings under such order of adjudication shall be stayed immediately upon the making thereof, and until the creditors shall have passed some special or ex-

inevitable; by reason of the amount of the debt due to the bank there never could be a sufficient majority in favour of a liquidation or composition. Rule 267 (1) speaks of notice being given to the debtor, but Rule 266 does not. There is no reason why notice should be given to the debtor in such a case, for he has declared himself insolvent, and the only question is, how his estate is to be administered.

SIR JAMES BACON, C.J.:—

I do not desire to throw any doubt upon the power of the Court under Rule 266 to adjudicate a debtor a bankrupt, when the proceedings have been regular. But it is the statute alone which authorizes the making of an adjudication, and I do not read Rule 266 as dispensing with the provisions of the statute with regard to the notice which is to be given to the debtor. There is no power to adjudicate a man bankrupt behind his back. The adjudication must be annulled, but it is not a case for giving costs.

Solicitors for the Debtor: Messrs. *Evans & Eagles.*

Solicitor for the Bank: Mr. *Horace Philbrick*, agent for Messrs. *Philbrick & Middleton, Colchester.*

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traordinary resolution in reference to the liquidation or composition; and, in the event of any such resolution being duly passed, the adjudication shall be forthwith annulled.

(1) Rule 267: "In the event of any neglect on the part of the creditors to pass such resolution, the Court may, on the application of any of the creditors, and after notice to the debtor, make an order of adjudication against the debtor, or direct the bankruptcy to be proceeded with, as the case may be."

M. R. 1874 Nov. 21.

In re LONDON AND PARIS BANKING CORPORATION.

Company—Winding-up—Creditor's Petition—Disputed Debt—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 80.

The omission of a joint stock company to comply with a statutory notice requiring payment of a debt, served by a creditor on the company under the *Companies Act*, 1862, s. 80, sub-s. 1, is not "neglect" within the meaning of that sub-section, unless there is no reasonable cause for the omission.

A creditor who has served such a notice is not entitled to a winding-up order if the company *bonâ fide* dispute the debt, and there is no evidence of the insolvency of the company (other than the non-compliance with the notice), and insolvency is denied on the part of the company.

Where a creditor whose debt was disputed served such a notice, and at the expiration of three weeks filed a Petition to wind up the company under circumstances which, in the opinion of the Court, shewed that the object of the Petition was not to obtain a winding-up order, but to put pressure on the company:—

Held, that the Petition must be dismissed with costs.

THIS was a Petition for a compulsory order to wind up the *London and Paris Banking Corporation, Limited*, presented by Mr. *Zuccani*, who claimed to be a creditor of the company for £267 14*s*.

The Petitioner was a furniture dealer, and had supplied furniture and goods for fitting up the offices of the company. The price charged by the Petitioner for such furniture and goods was £267 14*s*.; the directors of the company were unwilling to pay this amount in full, but offered to pay £155. On the 19th of October, 1874, the Petitioner caused a demand in writing to be served on the company, under sect. 80 of the *Companies Act*, 1862, requiring the company to pay the full amount claimed within three weeks. On the following day, the 20th of October, the Petitioner commenced an action in the Court of Exchequer for the recovery of the amount claimed. On the 21st of October the company's solicitors tendered to the Petitioner's solicitors a sum of £157 6*s*. in satisfaction of the claim; but the Petitioner's solicitors refused to accept this sum, and stated that their client would insist on payment of the full amount. Some correspondence then took place between the solicitors, with the view of having the matter referred to one of the

Masters of the Court; and both sides expressed themselves as willing that this should be done. On the 29th of October the declaration in the action was delivered. On the 3rd of November the company's solicitors took out a summons to refer the matters in dispute to a Master; but the Petitioner's solicitors having shewn an intention of opposing the application, the company afterwards abandoned it. The company ought in due course to have pleaded in the action on the 5th of November, but they obtained an extension of time for pleading until the 12th of that month. On the 11th of November the present Petition was presented. On the 12th of November the company (having in the meantime obtained the report of two valuers on the value of the furniture and goods) paid into the Court of Exchequer the sum of £197; and on the same day the company pleaded in the action.

The Petition now came on to be heard. There was no evidence (independently of the non-compliance with the statutory demand) of the insolvency of the company; and the secretary of the company had made an affidavit that it was solvent.

Mr. *Oswald* (Mr. *Southgate*, Q.C., with him), for the Petitioner, submitted that the Petitioner had a clear statutory right to a winding-up order: *Bowes* v. *Hope Mutual Life Insurance Company* (1); *In re Western of Canada Oil, Lands, and Works Company* (2).

Mr. *Bagshawe*, Q.C., and Mr. *Dundas Gardiner*, for the company, were not called upon.

SIR G. JESSEL, M.R.:—

The first question to be considered in this case is, What is the law on the subject? It has been asserted on the part of the Petitioner that there is a statutory right to a winding-up order given by the 80th section of the *Companies Act*, 1862, to any creditor who has given the statutory notice if non-payment has occurred by the company for a space of three weeks. Now, first of all, what does the statute say? It says that whenever a creditor to whom a company is indebted in a sum exceeding £50 has

(1) 11 H. L. C. 389. 11 Jur. N.S. 643. (2) Law Rep. 17 Eq. 1.

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served on the company in a certain way a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum or to secure or compound for the same to the reasonable satisfaction of the creditor, then the company shall be deemed to be unable to pay its debts. It is very obvious, on reading that enactment, that the word "neglected" is not necessarily equivalent to the word "omitted." Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold, upon the words of the statute, that where a debt is *bonâ fide* disputed by the debtor, and the debtor alleges, for example, that the demand for goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent valuers to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the statute.

It is next to be considered whether there is any authority on the subject; and it is satisfactory to me to find that the more recent authorities adopt the view which I have expressed. It is true that something occurred in the case of *Ex parte Rhydydefed Colliery Company* (1), which seems to shew that the Lords Justices did not hold that view. In a subsequent case, *Re Catholic Publishing and Bookselling Company* (2), which was heard in 1864, Lord Justice *Knight Bruce* was of opinion that the petition ought to be dismissed on two grounds: first, that it was not proved to his satisfaction that the petitioners were creditors of the company; and secondly, that assuming that they were, they had not shewn a case for winding up the company. Lord Justice *Turner* concurred in the opinion that the petition ought to be dismissed, but only on the second ground given by Lord Justice *Knight Bruce*, viz., that the proper time after service of the demand had not elapsed; and then he added these words: "Where there is a *bonâ fide* dispute as to the existence of the debt, and the case turns upon the question whether there is a debt, I think the

(1) 3 De G. & J. 80. (2) 2 D. J. & S. 116. 10 Jur. N.S. 301

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Court would do well to exercise the power given it by the 86th section of the Act to adjourn the petition till the existence of the debt is established." That seems to be a *dictum* only. The matter, however, does not stop there. The exact point came before Lord *Romilly* again in the case of *Re Brighton Club and Norfolk Hotel Company* (1). In that case, the builder who had built the hotel—and I suppose a man who builds an hotel is in quite as favourable a position as a man who furnishes an office—served the company with a statutory notice to pay him a balance of £3854 claimed by him. The company did not pay, and at the expiration of three weeks he presented a petition for winding up the company. The claim was disputed by the company. It was admitted that more than £50 was due to the petitioner, but no tender was made. The counsel for the petition contended that there being a clear debt of above £50, and a default (they used this word instead of the word in the statute, which is "neglect") for more than three weeks after demand for payment, there ought to be an order, or that, at all events, the petition ought to stand over until the petitioner had either substantiated his claim, or had failed in doing so. The Master of the Rolls, without calling upon the Respondents, said (2): "This is a novel experiment, and if I acceded to the application the consequence would be very serious to public companies. The meaning of the Act is this—if a debt above £50, which is not *bonâ fide* contested, be not paid or arranged within three weeks after demand, the Court may order the company to be wound up. It is not sufficient for a company to say 'We dispute the debt;' they must shew some reasonable ground for doing so. This is a *bonâ fide* contested debt, and though more than £50 appears to be due, I do not think that it is such a case as was intended by the Act . . . The whole of the evidence which has been laid before me clearly establishes that this is a contested question of account between the company and the petitioner, although something is due to him which would exceed the £50 mentioned by the statute. This, however, is not the case within the statute: for what should I have to do if I made the order? I could do nothing but take an account between these parties. If I made the order, I should still say to the company, Provided you pay

(1) 35 Beav. 204. (2) 35 Beav. 205.

M. R. 1874 *In re* London and Paris Banking Corporation.

what is due to the petitioner, I will stop the proceeding." He then dismissed the petition with costs. The same learned Judge gave a similar decision in *Re London Wharfing and Warehousing Company* (1). Although there may have been a difference, or apparent difference, of opinion between the Lords Justices *Knight Bruce* and *Turner*, I believe the Courts below have invariably acted on what, as I understand, was the opinion of Lord Justice *Knight Bruce;* and I should be bound by authority (even if I entertained a different opinion, which I do not) to hold that if the debt is *bonâ fide* contested, and there is no evidence other than non-compliance with the statutory notice to shew that the company is insolvent, and the company denies its insolvency (as this company does), I ought to dismiss the Petition. I must say, however, that the facts of this case go far beyond what I have stated, and are such as to convince me that this Petition has not been presented *bonâ fide*—that is, not with the view of obtaining a winding-up order, but with the object of extorting from the company a larger sum than they thought was fairly due, under pressure of a threat to present the winding-up petition.

[His Honour then stated the facts to the effect set forth above, and continued :—]

That being the position of matters, on the 11th of November the Petitioner thinks it right to present the Petition. I cannot treat that as a *bonâ fide* attempt on the part of the Petitioner to wind up the company. Obviously, if it had any meaning at all, it was to put pressure upon the company, perhaps, by threat of the advertisements, or by some other means, to compel them to pay; in other words, to extort from them a sum larger than they *bonâ fide* believed to be due from them, and a sum which they had been advised by two valuers was excessive. I cannot encourage any such course of proceeding, and I therefore dismiss the Petition with costs.

Solicitors: Messrs. *Crook & Smith;* Messrs. *Innes & Son.*

(1) 35 Beav. 37.

In re STRANTON IRON AND STEEL COMPANY.

BARNETT'S CASE.

M. R.
1875
Jan. 30.

Company — Winding-up — Contributory — Set-off against Call made before Winding-up — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 101.

In 1873 a call to the amount of £432 was made on a shareholder of a limited company to whom the company was indebted in £196. No part of the call was paid, and in 1874 the company was wound up under supervision:—

Held, that the debt could not be set off against the call.

Calisher's Case (1) discussed.

IN October, 1872, Mr. *Barnett*, who was a director of the *Stranton Iron and Steel Company, Limited*, and the holder of 432 shares, paid on behalf of the company a debt of £196 19*s.* due by the company.

This payment was alleged by Mr. *Barnett* to have been made in pursuance of an arrangement, the only evidence as to which was contained in the following passage of an affidavit sworn by Mr. *Barnett*:—

"I looked to the uncalled capital on my shares, which it was then expected would shortly be called up, to reimburse me the said payment. It was arranged between me and the said company, that the company being then in want of funds the payment should stand over, and that on such calls being made I was to be allowed the said payment, and I therefore did not take any proceedings to enforce payment of the said amount, as I should otherwise have done."

A call of £1 per share was made in May, 1873, and was not paid by Mr. *Barnett*.

In 1874 the company went into voluntary liquidation, which was afterwards continued under the supervision of the Court. The liquidators brought an action against *Barnett* for £432; but this action was stayed upon *Barnett's* application in the winding-up, he submitting to be bound by the decision of the Court whether the debt of £196 19*s.* due to him could be set off against the £432 due from him at the commencement of the winding-up.

(1) Law Rep. 5 Eq. 214.

M. R. 1875 BARNETT'S CASE.

The articles of association of the company empowered the directors to receive payment in advance of what was due on any shares.

Mr. *Romer*, for Mr. *Barnett*:—

First. There is an express agreement that after a call is made the moneys due by the company shall be treated as a payment of the call. That was within the powers of the directors, who were at liberty to receive payments in respect of the shares in advance. There has, therefore, been a payment within *Ferrao's Case* (1). Secondly. If there has been no payment, still at the commencement of the winding-up Mr. *Barnett* had a clear right to set off the debt due by the company against the call. There is nothing in the *Companies Act*, 1862, to take that right away. The company could only have recovered from *Barnett* the balance of the call; that balance is all that remains unpaid on the shares, and consequently there is no liability under sect. 38 of the *Companies Act*, 1862, to contribute anything more.

Mr. *Southgate*, Q.C., and Mr. *W. Latham*, for the liquidators, were not called upon.

SIR G. JESSEL, M.R.:—

I am of opinion that the set-off claimed cannot be allowed. The only evidence of any special agreement for set-off is contained in Mr. *Barnett's* affidavit; and in this respect I entirely agree with what was said by Lord *Romilly* in *Calisher's Case* (2), who there held that the sole assertion of the claimant was not sufficient in such a case. It is true that the affidavit has not been answered; but then the company has for all practical purposes ceased to exist; the liquidator is not the company. Mr. *Barnett's* allegation is that the arrangement was made between him and the company; he does not say who acted on behalf of the company, or when or how the arrangement was entered into, and I must hold that he has failed in proving his case.

Then a point is made, which is this: A creditor of a company, who is also a shareholder, has a call made upon him before the

(1) Law Rep. 9 Ch. 355. (2) Law Rep. 5 Eq. 214.

commencement of the winding-up. No action is brought by him, nor is any action brought against him by the company; but if there were no winding-up, the creditor would have the right to set off his debt against the calls; and the question is whether, in limited liability companies, that right is taken away by the provisions of the *Companies Act*, 1862, in the event of the company being wound up. Now, that very point was decided in *Calisher's Case* (1), and unless I entertained a strong opinion that the decision was wrong I should be bound by it. I think the decision was right, although I confess I am not satisfied with some of the reasons given for it.

A similar point came before the Court of Appeal in *Black & Co.'s Case* (2), and there the 38th section of the *Companies Act*, 1862, was relied on. I understand that case to have decided that that section is to be read literally. If that be so, then every member of a company is liable, in the event of its being wound up, for all the debts of the company, subject only to the qualifications specified in the sub-sections; and the only qualification applicable to the present case is that contained in the 4th sub-section, which is this: "In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." Here Mr. *Barnett* is a shareholder, there is an amount unpaid on his shares, and therefore, interpreting the section literally, he is liable to pay that amount which so remains unpaid.

Then the 101st section is adverse to the contributory. Lord Justice *Mellish*, in *Black & Co.'s Case*, says (3): "Although that section does not in terms say that there is to be no set-off, yet it shews that the Legislature, in framing that section, thought it had already been enacted that there should be no set-off, because in the 101st section they proceed to say that where there is unlimited liability, then, in the case of any independent contract, there may be a set-off." Lord *Romilly*, in *Calisher's Case*, expresses himself still more strongly. He says (4): "The Legislature has given the express power to allow a set-off in the case of an unlimited company, and by so doing it must be taken to have implied that with-

(1) Law Rep. 5 Eq. 214.
(2) Ibid. 8 Ch. 254.
(3) Law Rep. 8 Ch. 265.
(4) Ibid. 5 Eq. 217.

M. R. 1875 BARNETT'S CASE.

out such express provision there would be no right of set-off, and upon the principle of the maxim, *Expressio unius exclusio alterius*, to have excluded, for the reason stated by the Lord Chancellor in *Grissell's Case* (1), that right in the case of the contributories of a limited company."

In whatever way the 101st section is to be construed, I think it contains nothing to overthrow or qualify the plain literal meaning of the 38th section; and I am bound to hold the contributory in this case liable to pay the full amount unpaid on his shares.

I must say, however, that I do not assent to the view taken of the 101st section in *Calisher's Case* (2). I think that, when the proper time arrives, that section will require careful consideration. It is not a section which was framed for the purpose of taking away any rights. Now at the time when the Act passed there existed in certain cases a right of set-off; that right is not taken away by express words: is it taken away by implication? It does not follow that because an express right of set-off is given in certain cases in respect of calls made after the winding-up, a previously existing right of set-off is taken away. Neither does it seem to me to be enough that, as Lord Justice *Mellish* puts it, "the Legislature, in framing that section, thought it had already been enacted that there should be no set-off."

In the case of *In re Lundy Granite Company* (3), Lord Justice *Mellish*, speaking of a landlord's right to distrain, says: "It would be very extraordinary if the Legislature had deprived the landlord of that right without clear and express words and without giving him any compensation." It would be extraordinary if any right—and, *à fortiori*, a statutory right—were taken away from a creditor without clear and express words and without compensation. I cannot find the express words. It may be that upon further consideration I may be led to the conclusion that the true view of the section was taken in *Calisher's Case;* at present, all I can say is, that I think the subject is still open to discussion.

Solicitors: Mr. *H. W. Trinder;* Mr. *F. Heritage.*

(1) Law Rep. 1 Ch. 528. (2) Law Rep. 5 Eq. 214.
(3) Law Rep. 6 Ch. 462.

FOX *v.* LOWNDS.

M. R.
1875
Feb. 22.

[1875 F. 1.]

Charity—Mortmain Act (9 *Geo.* 2, *c.* 36)—*Voluntary Covenant—Impure Personalty—Abatement.*

A voluntary covenant to secure by will the payment of a sum of money to be applied for charitable purposes cannot be satisfied out of the impure personalty of the covenantor; and the debt created by the covenant must, like a legacy, abate in the proportion of the impure to the pure personalty.

By an indenture dated the 22nd of July, 1859, and made between *Ann Tulloch* of the one part, and the Plaintiffs of the other part, after reciting that *Ann Tulloch* was desirous of providing funds for a permanent chaplaincy in connection with the infirmary for the counties of *Newcastle-upon-Tyne, Durham,* and *Northumberland,* upon the conditions and in manner thereinafter expressed, it was witnessed that in pursuance of such desire *Ann Tulloch* thereby covenanted with the Plaintiffs (the intended first trustees) that she the said *Ann Tulloch* would, during her life, pay to the first and every succeeding chaplain who should be appointed to the infirmary by virtue of the indenture now stated the yearly sum of £100 (in addition to the yearly salary provided by the governors of the infirmary), by two equal half-yearly payments, as therein mentioned: and also would, either by deed to be executed by her in her lifetime, or by her will, well and truly secure to be paid to the said trustees, within three months after her decease at the most, with proper trusts for investment, such sum or sums of money as should thenceforth be sufficient to produce in perpetuity the yearly sum of £130 (in addition to such yearly salary provided by the said governors), and that the said yearly sum of £130 should thenceforth be paid to such chaplain as aforesaid in like manner as the said yearly sum of £100, which should then have terminated; and the indenture contained divers regulations with respect to the appointment of the chaplain.

Ann Tulloch afterwards intermarried with *John Blackwell,* who died in February, 1872.

Mrs. *Blackwell* made her will, dated the 29th of November,

M. R. 1875 FOX v. LOWNDS.

1873, and thereby bequeathed to the trustees of the indenture of the 22nd of July, 1859, such sum of money as should be deemed sufficient, if invested in Government securities, to produce the clear yearly sum of £130; and she directed that the trustees of the said indenture should stand possessed of the sum so bequeathed to them upon the trusts declared and contained in the indenture; and she further directed that no deduction should be made from the said sum for legacy duty, and that the said sum should take precedence of all other pecuniary legacies bequeathed by her; and she appointed the Defendants executors.

Mrs. *Blackwell* died in September, 1874. During her lifetime she regularly paid the salary of the chaplain to the infirmary; but she did not pay or secure to the Plaintiffs any sum for the purpose of raising the yearly sum of £130 covenanted to be paid by her.

Mrs. *Blackwell* was, at the dates of the indenture and of her will and at her death, entitled to pure personalty more than sufficient for the payment of the fund covenanted to be provided by her. She was also at her death entitled to realty and impure personalty. The Defendants, however, refused to pay the full sum covenanted to be provided by the testatrix, and this suit was instituted to obtain the opinion of the Court as to whether there was or was not to be an abatement.

Mr. *R. Swan* (Mr. *Southgate*, Q.C., with him), for the Plaintiffs:—

No doubt if our case depended on the bequest contained in the will, we should be unable to recover the full amount we claim, and the legacy would have to abate in the proportion of the impure to the pure personalty of the testatrix. But the covenant contained in the deed of the 22nd of July, 1859, created a legal obligation, which it was in the power of the testatrix to fulfil by inserting a direction in her will that the legacy given to the trustees of the deed should be paid out of her pure personalty; she has given no such direction, and, consequently, we are entitled to prove against her estate for a breach of that covenant. The other side will, no doubt, rely on *Jeffries* v. *Alexander* (1); but in that case the covenantor was not entitled to any pure personalty,

(1) 8 H. L. C. 594.

and the covenant was treated as a mere device for evading the provisions of the *Mortmain Act.*

Mr. *Chitty*, Q.C., and Mr. *Williamson*, for the Defendants:—

The case is governed by *Jeffries* v. *Alexander* (1), which decides that a voluntary covenant in favour of a charity cannot be satisfied out of the impure personalty of the covenantor. This is quite clear from the judgments of Lord *St. Leonards* and Lord *Kingsdown*. Lord *St. Leonards* says (2): "In my opinion the intention and the true construction of this instrument is, that it is a voluntary settlement of so much as the testator has directed of his personal estate (the nature of which I will presently consider) to be secured by this deed in anticipation of his will. Equity in the case of a bond to settle a certain sum of money does not regard the penalty or the nature of the security, but it looks to the act which was intended to be performed, and therefore the condition of a bond has frequently been considered and acted upon as an agreement for a settlement. Now the Act of Parliament expressly strikes at a settlement made in any way, attempting to charge property or to transmit property of the nature of chattels real to a charitable use." Again: "Nobody pretends that it is a charge in the proper sense of charge, but it is, indirectly, a settlement for charitable purposes of that property which he could not directly settle or charge;" and he puts this question, "Does or does not the gift by this deed, as the rule of equity stands, putting it on the highest ground on which you can place it, amount simply to a legacy, a legacy secured or directed by a deed, but still a legacy in the creation of it, a legacy in the gift of it, a legacy in the administration of assets for the payment of it, a legacy in all characters and qualities that it can possibly have?" Lord *Kingsdown* also lays it down that though in point of form there was in that case a debt, yet in substance it was a legacy: and being in effect a gift, it could make no difference whether it was made by deed or will. All these observations apply to the present case.

Mr. *Swan*, in reply.

(1) 8 H. L. C. 594. (2) 8 H. L. C. 657, 659, 664.

M. R. 1875 Fox v. Lowndes.

Sir G. Jessel, M.R.:—

I am of opinion that the case is really governed by the decision in *Jeffries* v. *Alexander* (1). I must consider first of all what is the law on the subject. Now the law on the subject prohibited anybody giving any interest out of real estate, or any moneys to be paid out of real estate, except in the manner pointed out by the statute. That was the law. Has this lady given money to be paid out of her real estate? Upon that there can be no question. This is a voluntary deed; it is therefore a gift, and the money which is claimed by the Plaintiffs is to be paid to the extent to which it is questioned out of her real estate. Therefore, if I hold this to be valid, I do enable her to give in an indirect way money out of her real estate for the benefit of a charity. This is the exact mischief aimed at by the statute, and the case is clearly within the spirit of the statute. Are the words of the enactment sufficient? I see no reason to doubt their sufficiency. Then, is this a gift of something to be paid out of real estate? On that I think the observations of Lord *St. Leonards* and Lord *Kingsdown*, in the case of *Jeffries* v. *Alexander*, are conclusive. This is in effect a covenant by this lady that her executors shall pay; that is what it comes to, though it is in form a covenant that she will, either by deed or will (she did it by will), within three months after her death, secure to be paid money sufficient to raise the annual salary of the chaplain of an infirmary. Any one executing a deed such as that must intend to create a voluntary debt, as it is called, which does not stand in a Court of Equity in the same position as a debt for value, to be paid after the decease of the person entering into the obligation out of the assets of that person. In what shape or way does that differ from a legacy in this Court, which is the Court which deals more especially with the administration of assets? It is postponed to all debts for value; it takes, no doubt, a certain priority over legacies, but except in that respect it differs in no way from a legacy. It is, so far as regards the administration of assets, in the same position as a legacy, or as it was put in *Jeffries* v. *Alexander*, it is in the nature of a legacy. Now what is the position of a legacy as regards assets? A man who gives a simple legacy of £100 to

(1) 8 H. L. C. 594.

M. R.
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a charity does not give any express directions that it shall be paid out of one class of assets more than another, but he does that which sets the law in motion, and which (when there is no question as to charity) would entitle the legatee to be paid out of his assets generally; and to the extent, therefore, to which real estate or impure personalty would be liable to contribute, to that extent the testator does direct his legacy to be paid out of realty and impure personalty, not by express words, but by the necessary consequence of the gift itself.

Now, as I understand the decision in *Jeffries* v. *Alexander* (1), it is quite immaterial whether the direction in the voluntary instrument to pay the charitable provisions out of assets is given in the form of a voluntary deed of covenant or is given by the will itself; the effect is the same; the intention is the same; and the intention is one which the law will not allow to operate. In my opinion, therefore, looking at that authority, the gift must be treated as failing to the extent of the proportion of the impure to the pure personalty.

Solicitors: Messrs. *Williamson, Hill, & Co.*, agents for Mr. *J. A. Philipson, Newcastle-upon-Tyne.*

In re BETHLEM HOSPITAL.

M. R.
1875
Feb. 27.

Railway Company—Lands taken by Company—Application of Purchase-money —Redemption of Land Tax—Costs—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 3, 69, 80—*Statutes, Principles of Construction of.*

The costs of the application of the purchase-money of lands taken by a railway company in the redemption of land tax are payable by the company.

THIS was a Petition by the Governors of *Bethlem Hospital*, asking that a sum of money in Court, being the price of lands belonging to the hospital which had been taken by the *Great Eastern Railway Company*, might be applied in the redemption of the land tax on other lands of the hospital, and that the company might pay the costs of the Petition and the redemption.

(1) 8 H. L. C. 594.

M. R.

1875

In re BETHLEM HOSPITAL.

The company objected to pay the costs of the redemption.

Mr. *Yate Lee*, for the Petition, submitted that land tax was a hereditament, and that the redemption of it was a reinvestment in land within the meaning of sects. 3 and 80 of the *Lands Clauses Consolidation Act*, 1845; and the costs ought therefore to be borne by the company. There were several decisions that the costs were payable by the company, viz.: *Ex parte Northwick* (1); *Ex parte Trafford* (2); *Re London, Brighton, and South Coast Railway Company* (3); *Ex parte Beddoes* (4); and there were none to the contrary.

Mr. *Jason Smith*, for the company, admitted that there were no decisions that the cost of redemption of land tax ought not to be borne by the company; but he submitted that land tax was treated in the Act as an incumbrance affecting the land, and it was well settled that the costs of paying off incumbrances did not fall on the company. He further submitted that the cases in the Exchequer were not binding on this Court: *In re Cherry's Settled Estates* (5); *In re Charity Schools of St. Dunstan's-in-the-West* (6). Those cases also shewed that the mere equity or spirit of the Act was not enough to entitle the Petitioner to costs. In *Ex parte Beddoes* no one appeared for the company, and the decision must be treated as made *ex parte*.

SIR G. JESSEL, M.R.:—

The question which I have to decide is one of considerable importance with regard to the principles and practice of the Court.

The *Lands Clauses Consolidation Act*, 1845, does not in words make the costs with which it is now sought to charge the railway company payable by them. What the Act says is (sect. 80), that the costs payable by a company are to include the costs of investments in Government or real securities, and of reinvestments in the purchase of lands; and by the interpretation clause the word

(1) 1 Y. & C. Ex. 166.
(2) 2 Ibid. 522.
(3) 18 Beav. 608.
(4) 2 Sm. & Giff. 466.
(5) 4 D. F. & J. 332.
(6) Law Rep. 12 Eq. 537.

8 Jur. N.S. 446

"lands" is to extend to tenements and hereditaments of any tenure. It is said that the case is very plain; but on that I give no opinion.

It has been decided that an order may be made for payment of costs, although no express words can be found authorizing it. One remarkable instance of this is the case of *In re Earl of Berkeley's Will* (1). That case originally came before me. I could not find any words authorizing the payment of the costs which were asked for in that case; but I felt that though there were no words in the Act the principles of justice required that the applicant should obtain the costs, and that he would obtain them if it were open to the Court to consider the spirit and meaning of the Act apart from the words; or, rather, if the general intent could be regarded apart from the precise form of the enactments; and I therefore referred the matter to the Lords Justices, thinking that by giving such an interpretation to the Act I was treading on dangerous ground. It was accordingly brought before the Lords Justices; and Lord Justice *James*, in giving his judgment, says this: "The sum which the company have paid is now in Court, and ought to be reinvested in land; but this ought to be done according to equitable principles, and the costs, charges, and expenses of the agent, properly incurred, ought in the first place to be paid out of the fund." That is to say, the Act directing the fund to be invested in land, His Lordship thought to apply the whole of it in that way would be contrary to justice, and that he could apply part of it in payment of costs, although there was no express provision for that in the Act. I take that case to decide that there is such a thing as construing an Act according to its intent, though not according to its words.

If that be so, there is nothing absurd in what Lord *Lyndhurst* said in *Ex parte Northwick* (2), which is a decision on the very point before me, the words of the Act of Parliament under which that order was made being undistinguishable from those of the *Lands Clauses Act*. Lord *Lyndhurst* said he thought the application within the spirit of the Act, and granted the petition. I wish, however, to say one word on the question of authority with reference to the construction of these Acts.

Assuming that a Judge thinks the construction to be clear one

(1) Law Rep. 10 Ch. 56, 58. (2) 1 Y. & C. Ex. 166.

M. P
1875
In re
BETHLEM
HOSPITAL.

way, but a series of authorities is produced, being decisions of Judges of co-ordinate jurisdiction, the other way, there must be a time at which the Judge is bound by them. If one authority were produced to me, and my own opinion were the other way, I would not follow that authority; but if the authorities are numerous, I admit that I must be bound. On that point the case of *In re Newman's Settled Estates* (1) is an authority. It was a question whether expenditure in erecting buildings was within the *Settled Estates Act;* I doubted whether it was, and referred the case to the Lords Justices. When the case was before me only two or three decisions, and those conflicting ones, were cited; but when it came before the Lords Justices the industry of counsel had found about twelve in favour of the application. The judgment of the Lords Justices was, that these numerous decisions ought to be followed; and they held that expenditure in building was a purchase of real estate within the meaning of the Act, though not so according to the ordinary use of language; and indeed Lord Justice *Mellish* remarked that he was not prepared to say that in the absence of authority he would have decided the case the same way. That case shews that a course of decisions on the construction of an Act of Parliament may be binding on a Judge even though his own opinion may be the other way.

Then is there such a course of decisions here as relieves me from considering the true meaning of the Act? I think there is. Four decisions are produced to me, of which three are on the exact point now raised. The first is *Ex parte Northwick* (2), which I have already mentioned, and which was decided forty-one years ago by a most eminent Judge, Lord *Lyndhurst*, who was then Lord Chief Baron. The next case is a most remarkable one. It is that of *Ex parte Trafford* (3). It came before Lord *Lyndhurst's* successor, Lord *Abinger*, and the case of *Ex parte Northwick* was cited. Lord *Abinger* said that "he fully agreed with Lord *Lyndhurst*, that cases of this nature came within the spirit of the Act, but he thought that that consideration alone, without stronger expressions on the part of the Legislature, would hardly authorize him to make such an order." I understand him to draw a distinction

(1) Law Rep. 9 Ch. 681. (2) 1 Y. & C. Ex. 166.
(3) 2 Y. & C. Ex. 522.

between the spirit of an Act, or that which a Judge conceives to be the spirit of an Act, and the intention, which, though not expressed in precise words, may be gathered from considering the terms of the enactment, and which amounts in fact to a species of construction; he thinks that unless he can find the latter he cannot make the order. He then consulted Lord *Lyndhurst*, and having done so he appears to have found that stronger expression which he required, and he made the order. The next case was that of *Re London and Brighton Railway Company* (1). That case was argued, and argued strongly; but Lord *Romilly* says, "I am of opinion that this case comes within the provisions of the *Lands Clauses Consolidation Act*, and that the application of the purchase-money to the redemption of the land tax is a reinvestment within the meaning of the 80th section. The costs of it are therefore payable by the railway company." That is an express decision that the application came within the provisions of the *Lands Clauses Consolidation Act.*

The last case is that of *Ex parte Beddoes* (2), before Vice-Chancellor *Stuart*, which was also a considered case. The order was made originally on a petition; a doubt was raised at the Registrar's office whether the costs of a reinvestment in redemption of land tax were costs properly payable by the company; the point was mentioned to the Court, and the point was argued at length by the counsel for the Petitioner; and the Vice-Chancellor made the order. That was in 1854, more than twenty years ago; and although no counsel appeared for the company, and the Vice-Chancellor did not deliver any judgment, still the point was clearly brought to his attention, and he decided it against the railway company.

Looking, then, at the number of these decisions, and at their dates, and finding that the earliest of them is based on a principle which cannot be considered as obsolete, I consider that I am precluded from considering whether, apart from decision, I should be of the same opinion. I simply follow the decisions, and make the order.

Solicitors: Messrs. *Still & Son;* Mr. *Shaw.*

(1) 18 Beav. 608, 611. (2) 2 Sm. & Giff. 466.

M. R. 1875 March 8, 9.

PRINTING AND NUMERICAL REGISTERING COMPANY *v.* SAMPSON.

[1873 P. 177.]

Patent—Assignment—Covenant to assign future Patents of like Nature—Public Policy.

An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy.

In August, 1872, *Marcus Bebro*, *William Ashcroft*, and *Simeon Sampson* (the Defendant in this suit) were entitled to seven-eighth shares of letters patent relating to inventions made by *Bebro*, described as "inventions applicable to the mechanism or apparatus employed for numbering and printing tickets consecutively, and for containing and delivering tickets or continuous lengths of paper, or other similar materials;" and it was intended to form a company with limited liability for the purpose of purchasing and working these patents. Accordingly an agreement in writing, dated the 31st of August, 1872, was entered into between *Bebro* of the first part, *Ashcroft* of the second part, the Defendant of the third part, and *E. Samuelson* of the fourth part, whereby the parties of the first three parts (therein called the vendors) agreed immediately after the allotment of shares in the proposed company to deduce a good title to the aforesaid shares in the said patents, and to assign the same to the company, or trustees for the company; and thereupon the company was to pay to the vendors a sum of £48,750 in such shares and at such time and in such manner as thereby provided. The agreement contained the following stipulation:—"The vendors shall enter into a covenant with the said company to assign, as and when required by the company or their directors, all future patent rights, or in the nature of patent rights, which they or any of them may hereafter acquire with respect to the aforesaid inventions, or any of them, or any of a like nature in the *United Kingdom*, or any part thereof, the *Channel Islands*, the *Isle of Man*, or all or any part of the continent of *Europe*."

The proposed company was duly registered and incorporated in

December, 1872. The agreement of the 31st of August, 1872, was carried into effect; the purchase-money was paid, and the patents were assigned by the Defendant and the other persons entitled thereto; but no covenant to assign future patents was entered into as provided by the agreement.

In February, 1873, the Defendant took out a patent for an invention which the directors of the company alleged to be of a like nature with those which were the subject of the agreement of August, 1872; and the directors accordingly required the Defendant to assign to the company; but the Defendant refused to do so; and thereupon the bill in this suit was filed by the company, seeking to compel the Defendant to assign the patent in question, and to execute a deed of covenant to the effect stipulated for by the agreement of the 9th of August, 1872.

The cause now came on to be heard. At the hearing two defences were relied upon: first, that the patent of February, 1873, was not of a like nature to those comprised in the agreement of August, 1872; secondly, that an agreement to assign future patents was against public policy, as tending to discourage inventors. This report is confined to the latter question.

Mr. *Aston*, Q.C., Mr. *Chitty*, Q.C., and Mr. *Bunting*, for the Plaintiffs.

Mr. *Southgate*, Q.C., Mr. *Marten*, Q.C., and Mr. *Hamilton Humphreys*, for the Defendant.

SIR G. JESSEL, M.R., after discussing the nature of the inventions which were the subject of the agreement of the 31st of August, 1872, continued:—

The buyers were about to form a company to work the invention, that means to produce tickets with numbers. That was to be their business. They were to produce and sell a commodity, the object of the invention being to produce that commodity more cheaply than had been done before. It was an old commodity, an old product, but had not been produced in the same manner before. The object of the company, therefore, was to sell the old product at a lower price than the price at which it could be produced by the modes in use before this invention was patented, and

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thereby to obtain business. That is the object. Being about to establish that company, and being about to buy the invention, they found the invention not in the exclusive hands of the inventor, but in the hands of himself and his assigns, persons who had acquired by purchase some portion of his patent rights.

Now nothing is better known than this, that when persons have turned their attention to a particular class of invention they are likely to go on and invent, and likely to continuously improve the nature of their invention, and continuously to discover new modes of attaining the end desired. Persons, therefore, who buy patents of inventors are in the habit of protecting themselves from the utter destruction of the value of the thing purchased by bargaining with the seller that he shall not use any new invention of his for producing that product in which they are about to deal at a cheaper rate, because if he were allowed to do so he might, the day after he had sold his patent, produce something which, without being technically an infringement, and without being technically an improvement, might accomplish the desired object in some other way, and utterly destroy the value of that which they had purchased. They, therefore, not unreasonably, and not unusually, make it a part of their bargain that whatever the man discovers of the same kind in the shape of machinery or apparatus which will produce the product in which they are about to deal shall belong to them. They say, "We cannot buy on any other terms, because otherwise we are exposed to the instantaneous, or almost instantaneous, competition of the inventor with the benefit of his previous experience." That, as I said before, is not an unusual, nor is it an unreasonable, bargain. Now the vendors in this case were of two classes. There were the class of inventor and the class of purchaser of inventions, and it is quite reasonable that there being the latter class in the market the purchasing body of persons should say to the vendors, "You shall not buy up any of these inventions to set up against me," otherwise the same evil might arise from purchase as from fresh invention; the vendors being in the trade, or undertaking the trade, or having turned their attention to the trade, might look out next day for a similar patent, for some patent, that is, which produced the same result, and start in trade against the purchaser. It is, therefore, not unreasonable to provide that the vendors shall not even buy any patent except

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upon the terms that it shall belong to the purchaser. That is the position of the parties.

Now, it was said on the part of the Defendant, that such a contract as that which I have mentioned, a contract by which an inventor agrees to sell what he may invent, or acquire a patent for before he has invented it, is against public policy, and it was said to be against public policy, because it would discourage inventions; that if a man knows that he cannot obtain any pecuniary benefit from his invention, having already received the price for it, he will not invent, or if he does invent will keep it secret, and will not take out a patent. It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it does apply; but I should be sorry to extend it much further. However, I am satisfied there is no reason for so extending it in this case. In the first place, it is assumed that a man will not invent without pecuniary reward. Experience shews us that that must not be taken as an absolute truth. Some of the greatest inventions, which have been of the most benefit to mankind, have been invented by persons who have given their inventions freely to the world. Again it is supposed that a man who has obtained money for the future products of his brain will not be ready to produce these products. That must not be assumed. Nothing is more common in intellectual pur-

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suits than for men to sell beforehand the future intellectual product before it is made, or even conceived. Does any one imagine that it is against public policy for an artist to sell the picture which he has never painted or designed, or for the sculptor to sell the statue, the subject of which is to be hereafter given to him, or for the author to sell the copyright of the book, the title of which is even as yet unknown, or, more than that, that a contributor to a periodical may agree that he will devote himself to the exclusive service of a certain periodical for a given period, for a given reward? These examples are, to my mind, entirely repugnant to the argument that there is any public policy in prohibiting such contracts. On the contrary, public policy is the other way. It encourages the poor, needy, and struggling author or artist. It enables him to pursue his avocations, because people rely upon his honour and good faith, and the ordinary practice of mankind; and it will provide for him the means beforehand which, if the law prohibited such a contract, he could not otherwise obtain. This appears to me to apply as much to a patent invention as to any other subject which the intellect can produce. A man who is a needy and struggling inventor may well agree either for a present payment in money down, or for an annual payment, to put his intellectual gifts at the service of a purchaser. I see, therefore, not only no rule of public policy against it, but a rule of public policy for it, because it may enable such a man in comparative ease and affluence to devote his attention to scientific research, whereas, if such a contract were prohibited he would be compelled to apply himself to some menial or mechanical or lower calling, in order to gain a livelihood. I think, therefore, if the question were to be debated solely on those considerations, such a contract as this could not be deemed against public policy, and I say that because this argument is one which is frequently used, and when it is brought forward deserves, as it has received from me on the present occasion, the most attentive consideration.

[His Honour then considered the remaining points, and made a decree for the Plaintiffs.]

Solicitors: Messrs. *Newman, Dale, & Stretton;* Messrs. *Pritchard, Englefield, & Co.*

In re BERKELEY'S ESTATE.
BERKELEY *v.* MASON.

[1875 B. 52.]

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March 20.

*Practice—Administration Summons—Will of Married Woman—Service of Order—*15 *&* 16 *Vict. c.* 86, *ss.* 45, 42.

A married woman, having under a will an absolute power over a fund, made a will whereby she appointed it specifically to trustees upon trust for *A.* for life, with remainders over; and made a residuary gift to the same trustees upon certain trusts. One only of the trustees proved the will :—

Held, that the Court had jurisdiction under 15 & 16 Vict. c. 86, s. 45, to make an order upon summons by *A.* for administration of the estate of the married woman.

Under 15 & 16 Vict. c. 86, s. 45, the only person to be served with the summons is the executor or administrator of the deceased; but the Court has power to direct service of the order upon other persons with the like effect as when service of a decree is directed under sect. 42.

THE Hon. *Caroline Martha Berkeley*, the wife of the Hon. *G. C. G. F. Berkeley*, was, under the settlement made on her marriage, empowered in the event of her surviving her husband to appoint by will certain funds and also certain shares in real estate at *Berbice* among her children; and she had under the will of her mother absolute power of appointing a sum of £9889 1*s.* 3*d.* Reduced Annuities, and she had also under a deed absolute power of appointing by deed or will the sum of £972 8*s.* New Three per Cents. She made her will, dated the 16th of June, 1869, and thereby, after reciting the various powers to which she was entitled and certain appointments she had already made thereunder, she in exercise of the powers in that behalf contained in the settlement, and whether as surviving her husband or not, purported to appoint all the funds comprised in the settlement over which she could by possibility have any power of appointment (except any estate or interest in the property at *Berbice*), to *William Henry Charlton*, Sir *John Swinburne*, and *James Mason*, upon trust to procure the same to be transferred to them and to stand possessed thereof upon trust to pay the income to her son, *E. S. F. Berkeley*, for life, and after his death upon trusts in favour

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of his children. And she appointed the sums of £9889 1*s.* 3*d.* Reduced Annuities, and £972 8*s.* 7*d.*, New Three per Cents., to the same trustees upon trust thereout to set apart funds sufficient to pay the legacies and answer the annuities which she might leave by any codicil to her will; and she declared that the trustees should hold the residue of the said annuities which should not be applied to answer the said annuities and legacies, and also, on the cesser of each of the said annuities, the fund set apart to answer the annuity so ceasing upon the like trusts as were thereinbefore declared with respect to the property comprised in the settlement; and after appointing the shares in the estate at *Berbice* to the same trustees upon certain trusts, she gave, devised, bequeathed, and appointed all the residue of her property, both real and personal, to her said trustees, their heirs, executors, administrators, and assigns, according to the nature thereof, upon trust for her niece *Harriett Berkeley* during her life, and after her death upon trust for her (the testatrix's) niece *Emily Scrope* absolutely. The testatrix subsequently made two codicils to her will, by which she gave certain legacies and annuities.

The testatrix died on the 15th of February, 1873, and her will and two codicils were proved by *James Mason* alone.

The usual summons for administration of the estate of the testatrix was taken out by Mr. *E. S. F. Berkeley* against Mr. *James Mason*, and was adjourned into Court.

Mr. *Jason Smith*, in support of the summons:—

The Court has full power under the provisions of 15 & 16 Vict. c. 86, s. 45, to make an order on this summons: *Sewell* v. *Ashley* (1). The other side will probably rely on *Re Newbery* (2); but although that case might appear from the head-note of the report to be an authority that an order cannot be made on summons where a married woman bequeaths property under a power contained in a will, there is nothing in the judgment to justify the head-note, and the decision appears to have rested on grounds which are quite inapplicable to this case.

Mr. *Crossley*, for Mr. *James Mason*:—

The applicant is not a legatee within the meaning of 15 & 16

(1) 3 D. M. & G. 933. 17 Jur. 269 (2) 10 W. R. 378.

Vict. c. 86, s. 45; he is equitable tenant for life of the residue of a specific fund after payment thereout of certain legacies and annuities. Again, although the Defendant is the sole legal personal representative of the testatrix, he is only one of the trustees of her will in whom the fund is vested. The other trustees are not before the Court. Under the old practice, no decree could have been made in their absence: *Nelson* v. *Seaman* (1); and the provisions of 15 & 16 Vict. c. 86, s. 42, do not apply to such a case as this. In fact, the applicant would have no right to file a bill for the administration of the estate; if a suit had been instituted the proper Plaintiffs would have been the trustees, who alone can give a legal discharge for the fund; and the 9th rule of the 42nd section of 15 & 16 Vict. c. 86, shews that this is so even under the present practice of the Court.

Besides, the only order the Court can make on the summons is "the usual order for the administration of the estate of the deceased:" 15 & 16 Vict. c. 86, s. 45: *West* v. *Laing* (2); *Partington* v. *Reynolds* (3). Here a complicated decree will be necessary, and the Court ought, as a matter of discretion, to refuse an order; even if it has jurisdiction to make one, which I contend it has not.

SIR G. JESSEL, M.R.:—

This case appears to me to be concluded by authority. I entirely concur (if my concurrence were of any value) in what was said by Lord Justice *Knight Bruce* in the case of *Sewell* v. *Ashley* (4), and I desire to read a portion of his remarks by way of comment on the argument which has been addressed to me. They are as follows: "In this case an infant legatee is by her next friend seeking in a compendious and inexpensive mode that which beyond all possibility of question she has a right to seek and obtain by a longer and more expensive mode of proceeding in this Court, and it would therefore be a matter of great regret if the convenient and useful enactment which she seeks to have applied to her case could not be so applied." Mr. *Crossley* has indeed suggested that the applicant in this case could not obtain a decree on a bill filed

(1) 1 D. F. & J. 368.
(2) 3 Drew. 331.
(3) 4 Drew. 253.
(4) 3 D. M. & G. 936.

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by him: but from that I dissent. The facts are simple: A married woman having under a will a testamentary power of appointing a fund, executes the power, and appoints the fund to trustees upon trust to pay legacies and annuities, and subject thereto to pay the income to the applicant for life. It is said that the applicant could not file a bill to have the usual accounts taken; it is said that the trustees must file the bill; and the 9th rule of the 42nd section of the *Improvement of Jurisdiction of Equity Act* (15 & 16 Vict. c. 86) is invoked in support of that proposition. That rule is as follows: "In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate." That rule does not contain negative words excluding the right of any person other than trustees to sue: it was not intended to exclude any such right; and the practice ever since the passing of the Act has been to the contrary of the suggestion now made, and, so far as I am concerned, shall so continue.

Then the 45th section of the same Act provides that legatees may obtain a summons requiring the executor or administrator of a deceased person to shew cause why an order for the administration of the estate of the deceased should not be granted; and that it shall be lawful, upon proof of service of the summons, for the Judge to make the usual order for administration. It is said that this section can only apply where the executor or administrator would have been the only Defendant to a suit instituted by the legatee under the old practice; and that it does not apply where (as in the present case) other persons would have been under that practice necessary parties to the suit; and, inasmuch as the rules contained in the 42nd section have no application to summonses under the 45th section, it is said that no order can be made on this summons. It would be lamentable if it were so; for the result would be that a legatee might be driven to file a bill, and then all the rules in the 42nd section would apply, and he would then obtain a decree against the very persons, and those persons only, against whom a decree, according to this contention, could not be

made on summons. But I take the meaning of the Legislature to be that you were only to serve the executor or administrator, and that the section amounts to an enactment that you need not serve anyone else.

That being so, does the section apply to the will of a married woman? That is a fair question. *Primâ facie* the language of the section is not appropriate to that case. The summons is to be obtained by a "specific, pecuniary, or residuary legatee." Now, in strictness, the persons entitled under the will of a married woman are "appointees;" though they are in a sense "legatees," that word is not the appropriate term for describing them. Then the summons is to be taken out against the "executor or administrator of the deceased person;" but the executor or administrator under such a will is not the general executor or administrator of the deceased, but has only a limited administration granted to him. Again, the order to be made is the usual order for the administration of "the estate of the deceased:" but in the case of the will of a married woman the order can only be for the administration of what she had power to dispose of by will. It looks therefore at first sight as if the draftsman had not intended to include the case; but the words are nevertheless sufficient to include it, especially having regard to the provisions of the 24th section of the *Wills Act;* and it was decided in *Sewell* v. *Ashley* (1) that the case of the will of a married woman is not excluded. I am therefore bound to hold (and I am glad so to hold) that the case of a married woman is within the section.

It is then said that there has been some suggestion that there is a difference where the power is created by will and not by deed, as was the case in *Sewell* v. *Ashley.* But the instrument to which the 45th section points is, not that which creates, but that which executes the power; if there is any distinction at all, it is in favour of a power created by will, and such a distinction would have operated against the decision in *Sewell* v. *Ashley,* by which I am bound.

It is also said that the applicant is not a legatee. He is as much a legatee as any one else who takes a pecuniary benefit under a testamentary disposition made by a married woman in

(1) 3 D. M. & G. 933.

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pursuance of a power. In one sense all such persons are legatees; in another they are appointees.

Then what, according to the Act, is to be done on the summons? The Judge is to make "the usual order for the administration of the estate of the deceased, with such variations as the circumstances of the case may require." There is nothing to abridge the right of the Judge to make the proper decree to work out the equities between the parties. Then the Act further provides that the Judge "shall have full power . . . . to give any special directions touching the execution or carriage of the order." The practice for the last twenty years has been to treat those words as entitling the Judge to give directions as to what persons are to be served with the order, and those persons may then come in under it, in the same way as if they had been served with a decree under the 42nd section. I can see that Lord Justice *Knight Bruce* did not forget that; for he concludes his judgment in *Sewell* v. *Ashley* (1) by saying, "Whether the jurisdiction should be exercised, and to what extent, and on what conditions, and in the presence of what parties, it will be for his Honour to determine." I shall therefore make the order asked for; and I direct it to be served upon the trustees and the residuary legatees; and the costs will be costs in the cause.

Mr. *Crossley* said that there might be some question whether the decree ought to include the estate in *Berbice*, being real estate situated in a foreign country; but that the trustees were desirous that the decree should, if possible, extend to that property.

SIR G. JESSEL, M.R.:—

If the trustees will appear and submit to the jurisdiction, I will make a decree extending to that property.

Solicitors: Messrs. *R. S. Taylor & Son;* Mr. *James Mason.*

(1) 3 D. M. & G. 933.

Applied. THOMAS *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 1157.

Followed. THOMAS *v.* CUNARD WHITE STAR LD. [1951] P. 153

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V.-C. M.

[1870 S. 221.]

1875

Jan. 16; *Feb.* 13.

Costs—Taxation—Party and Party—Explanatory Drawings—Solicitor's Clerk—Counsel's Fees—Attendance on Cross-examination—Employment of Three Counsel—Refreshers.

On taxation of costs as between party and party, the only costs chargeable against the unsuccessful party are such as are necessary for the conduct of the litigation. Therefore, in a suit to restrain the infringement of a patent, in which the Defendant had set up several cases as anticipations, the costs of drawings of exhibits for the purpose of affixing to the margin of counsel's briefs were disallowed.

Charges for the attendance of a solicitor's clerk in addition to the solicitor on cross-examination will not in any case be allowed.

The charge to be allowed for counsel's fees for cross-examination will not ordinarily exceed £5 5*s.* a day after the first, for which a larger fee may be allowed in heavy cases; and where the case is long and complicated, as much as £7 7*s.* a day may be allowed for the subsequent days.

A moderate fee, such as £7 7*s.* a day, may be allowed for a scientific witness to read up a case for the purpose of giving evidence.

The rule that charges will not be allowed for employing more than two counsel will only be departed from in exceptional circumstances, and in determining whether such circumstances exist the amount of interest which the successful party has in maintaining the suit may be taken into consideration.

The rule of the Common Law Courts as to refreshers applies to the hearing of heavy suits in Chancery, whether on written or *vivâ voce* evidence; but the brief fee may fairly be taken to cover two days, after which refreshers should be allowed.

THESE were two summonses to review the taxation of the costs of the suit, taken out by the Plaintiff and Defendants respectively.

The bill was filed to restrain an alleged infringement of a patent obtained by the Plaintiff, in January, 1861, for improvements in the manufacture of swivel rings for watch chains and other purposes. One ground of defence to the suit was that of anticipation, and many different articles were put forward as containing arrangements identical with that used by the Plaintiff. The evidence was very voluminous, and the hearing before the Vice-Chancellor occupied eleven days. His Honour made a decree for a perpetual injunction, with costs.

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This decree was reversed on appeal, and the bill dismissed with costs, partly in consequence of one of the Defendants' exhibits having been cut open after the hearing before the Vice-Chancellor, and found to contain an arrangement almost identical with that forming the subject-matter of the Plaintiff's patent.

The Defendant's costs had, on taxation before Master *Wainwright*, been reduced from £2193 to £1300, but further deductions which were claimed by the Plaintiff had been disallowed by the Taxing Master, and formed the subject of the Plaintiff's summons. Numerous items were objected to.

The first objection related to charges which had been allowed for the preparation of drawings and sections explanatory of the exhibits to the Defendants' affidavits, and required for no other purpose than that of being affixed to the margin of the copies of the evidence supplied to counsel, for the purpose of rendering them more intelligible. The objection was made on the ground that the charge for drawing plans and sections was not chargeable between party and party, and that the drawings were not necessary.

Mr. *Glasse*, Q.C., and Mr. *Freeling*, for the Plaintiff:—

This is a charge not necessary for the conduct of the litigation, and therefore one which a litigant ought not to be required to pay on a taxation as between party and party. The question is one of principle, and therefore open: *Morgan* and *Davey* on Costs (1).

Mr. *W. Pearson*, Q.C., for the Defendant:—

This is a mere question of detail, in which the Court will not interfere. There must be some question of principle involved to induce the Court to review a taxation.

[The VICE-CHANCELLOR:—Although the Court is reluctant to go into questions of detail, it will do so in a proper case, and even in a question of *quantum* will do so, where there has been a charge of a very exorbitant character.]

The charge is, moreover, a necessary one. The drawings are of appliances made exhibits in the suit for the purpose of shewing anticipations of the Plaintiff's patent. The Plaintiff himself asked

(1) Page 346.

for copies of the drawings, and therefore cannot say that they were not necessary.

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. The present case illustrates this principle very clearly. I am satisfied that the Plaintiff's invention of this swivel was a most meritorious one, and, though he was ultimately unsuccessful in the suit, because there was held to be an anticipation, and therefore he must pay the costs, I think he ought to bear no more than the necessary costs. I adhere to the rule which has already been laid down, that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them.

The Plaintiff is the attacking party, and has failed, and he must therefore pay all charges necessary to the litigation. But if the Defendants give greater facilities for the conduct of the case than are strictly necessary, they ought not to be allowed to throw them upon the Plaintiff. I have no doubt that what was done was very convenient, and this was proved by the fact that the Plaintiff took advantage of the drawings. But I am of opinion that if the suit had gone the other way, such charges could not have been thrown upon the Defendants, and therefore the Plaintiff ought not to be required to pay them.

I have myself, when at the Bar, held as many briefs as fall to the lot of most men, and I have often found in the papers supplied to me things which, though very convenient, were not absolutely necessary. Therefore, though I very reluctantly differ from so experienced a Taxing Master as Mr. *Wainwright*, I am compelled to do so in this case, because, though these drawings are very convenient, I cannot consider them necessary.

A series of objections were made to charges of fees of £1 1*s.* per

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day each for the attendance of a solicitor's clerk on the cross-examination of witnesses before the Examiner. These charges were in addition to charges of £2 2*s.* for each day's cross-examination in respect of the attendance of the solicitor himself. The charges were objected to on the ground that they could not be allowed in addition to the attendance of counsel and the solicitor.

Mr. *Glasse*, Q.C., and Mr. *Freeling*, for the Plaintiff.

Mr. *W. Pearson*, Q.C., for the Defendant:—

The attendance of the clerk was required on account of the great number of exhibits, and the constant necessity to have some one to hand them up to counsel.

SIR R. MALINS, V.C.:—

I do not think the charge for the attendance of the clerk can be defended, as being necessary. I do not know of any case where the attendance of two solicitors has been allowed. It would, probably, turn out that the clerk was really engaged, and the solicitor looking on. The attendance of the clerk cannot be allowed.

A charge of £15 15*s.* for fees to a scientific witness, for being engaged two days in reading the papers, giving instructions for and settling and being sworn to his affidavit, was objected to as being excessive, and not according to practice, as between party and party. The Taxing Master stated, in his reasons for allowing the charge, that he considered these payments just and reasonable payments, properly incurred in procuring the evidence of the witness, and his attendance as a witness.

Mr. *Glasse*, Q.C., and Mr. *Freeling*:—

The utmost fee allowed for the attendance of a witness is £1 1*s.*, if in the town where his attendance is required, and £3 3*s.* if anywhere else. If this charge is allowed there is no limit which can be set to payments to scientific witnesses.

Mr. *W. Pearson*, Q.C.:—

The Taxing Master, in all these cases, only allows what is

reasonable. The universal practice of the office is to allow a fee to a scientific witness for stating what he can put into his affidavit. That is why the objection is only grounded on the charge being excessive, and does not venture to state it to be improper altogether.

SIR R. MALINS, V.C.:—

I will make some inquiries at the Taxing Master's office, and state the result on a future occasion.

A charge of £10 10*s.* for each day's attendance of the Defendant's cross-examining counsel before the Examiner was objected to as being excessive, and such as ought not to be allowed as between party and party.

Mr. *Glasse*, Q.C., and Mr. *Freeling* :—

The charge is double what would be allowed in the case of counsel practising at the Chancery Bar; and parties cannot increase the usual charges by instructing counsel who usually practise in the Common Law Courts.

Mr. *W. Pearson*, Q.C. :—

The Court will not interfere with the discretion of the Taxing Master as regards the amount of counsel's fees: *Cousens* v. *Cousens* (1); *Parkinson* v. *Hanbury* (2).

Mr. *Glasse*, in reply :—

It ought not to go forth that the Court has no power to review a taxation as regards the amount of counsel's fees. *Cousens* v. *Cousens* has been explained in the later case of *Betts* v. *Cleaver* (3) to have been expressed a little too widely; and the right of the Court to go into the question is clear: *Davey* and *Morgan* on Costs (4).

SIR R. MALINS, V.C. :—

I think that, as between adverse litigants, it is in general reasonable that the fee for each day's attendance before the Examiner

(1) Law Rep. 7 Ch. 48.
(2) 13 W. R. 1056.
(3) Law Rep. 7 Ch. 513.
(4) Page 352.

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should be limited to £5 5*s.*, whether the examination takes place before the public or a special examiner. But it does not seem unreasonable that in so heavy a case as this there should be an additional fee for the first day's cross-examination. For the subsequent days, considering all the circumstances, I think £7 7*s.* would be a fair charge. I do not proceed on the ground that the fee paid was excessive. I think it was reasonable in itself, but that as between party and party it was more than ought to be thrown upon the unsuccessful litigant.

With regard to the case of *Cousens* v. *Cousens* (1), which Mr. *Pearson* insists concludes me from considering the *quantum* of counsels' fees, it appears from *Betts* v. *Cleaver* (2) that the Court thought it had gone too far in the expressions used, and, in my opinion, it did go too far. But I adhere to the well-settled rule that the Court will only very slowly and reluctantly go into the question of the *quantum* of fees allowed on taxation.

Feb. 13. SIR R. MALINS, V.C.:—

I have been informed by Mr. *Follett*, the next senior Taxing Master to Mr. *Wainwright*, that there is no positive rule for fixing an allowance to scientific witnesses for reading up a case with a view to giving evidence upon it. I consider that the sum of £7 7*s.* a day is by no means too high, and I therefore allow that item.

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The next head of objection, which comprised several items, related to the employment of three counsel, the Plaintiff contending that as between party and party the third counsel ought to be disallowed. The Taxing Master stated, as his reason for allowing the charges arising out of the employment of the third counsel, that, considering the length of the evidence, the nature of the case, the intricacy of the mechanical details, and the issues to be decided, and that the Plaintiff himself had three counsel, he was of opinion that the employment by the Defendants of a third counsel was not improper. He therefore allowed the charges in question.

(1) Law Rep. 7 Ch. 48. (2) Law Rep. 7 Ch. 513.

Mr. *Glasse*, Q.C., and Mr. *Freeling*:—

The rule is, that the costs of only two counsel are allowed on a taxation as between party and party, and this rule is only departed from in very rare cases, where the great importance of the cause, the extent of the pleadings and evidence, and the time likely to be occupied in the hearing, justify an exception. This was laid down in *Smith* v. *Earl of Effingham* (1), where the Master of the Rolls had before him the rules of the Master's office. *Pearce* v. *Lindsay* (2) exemplifies the sort of case required to justify a departure from the rule. There a third counsel was allowed on the ground that the case was one of great importance and difficulty, and of unusual length, and the evidence extended over 7050 folios, and was very conflicting. In *Wentworth* v. *Lloyd* (3), where three counsel were also allowed, the case occupied six days in hearing, and the pleadings and evidence extended over 6000 folios, and required an unusual amount of care. But in *Attorney-General* v. *Munro* (4), although a case of great importance, only two counsel were allowed. *Cousens* v. *Cousens* (5) and *Betts* v. *Cleaver* (6) only relate to taking a third counsel as junior where the original junior has been called within the bar pending the suit. There is nothing in the present case to make the allowance of three counsel proper.

Mr. *W. Pearson*, Q.C.:—

The present case may well be allowed to rest upon that of *Pearce* v. *Lindsay*, which shews that there is no inflexible rule that no more than two counsel can be allowed on taxation as between party and party. On such a point the Court may well trust to the discretion of the Taxing Master, who must acquaint himself with all the details of a case, and is able to judge of its difficulties. Notwithstanding the existence of such a rule, the cases cited shew that the Court has departed from it in many instances, as in the cases cited of *Pearce* v. *Lindsay*, *Wentworth* v. *Lloyd*, and *Cousens* v. *Cousens*; and also in *North-Eastern Railway Company* v. *Jackson* (7). Everything depends upon the length and im-

(1) 10 Beav. 378.
(2) 1 D. F. & J. 573.
(3) Law Rep. 2 Eq. 607.
(4) 1 Mac. & G. 213.
(5) Law Rep. 7 Ch. 48.
(6) Ibid. 513.
(7) 22 W. R. 629. W.N. (1874) 113.

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portance of a case, and the hearing of this case lasted eleven days against the six days occupied by *Wentworth* v. *Lloyd* (1), and the evidence here amounts to 2000 folios, and is of a kind which necessitates the most careful and minute examination and comparison with numerous drawings. There is, moreover, the fact that the Plaintiff himself had three counsel.

SIR R. MALINS, V.C.:—

It is at all times difficult to decide questions which depend entirely upon discretion. Here there is nothing to guide me except the ordinary rule that the fees of only two counsel are allowed in taxation of costs as between party and party. That being the general rule, the burthen of proving the necessity for employing three counsel rests with the person who employs them. Cases have been cited in which three counsel have been allowed, the fair result of which is that, in deciding whether the ordinary rule may be departed from, I must have regard to the nature of the case, the length of the evidence, and the subject-matter of the suit, because those cases shew that it may be done in suits of great importance, involving a large amount of property or long and complicated accounts; such as *North Eastern Railway Company* v. *Jackson* (2), where the property involved was of enormous value, and the accounts extended over a very long period, and were of the most complicated character.

Now, having regard to all these considerations, if I look at this case simply with reference to the length of time it occupied in hearing, I might be inclined to say that the employment of three counsel would be justified. The papers were of great length, and there was considerable trouble in sifting and arranging the immense mass of evidence, as I myself found when I came to write my judgment. But I think that the Court must have also regard to the interest at stake between the parties. The bill itself was very short, and was filed to restrain the infringement of a patent which had been in existence without any opposition for ten years. It had been acquiesced in by the trade, and was considered an invention of great utility, as appeared from affidavits by the large jewellers in most parts of the country. The patent had only

(1) Law Rep. 2 Eq. 607. (2) 22 W. R. 629. W M (1874) 113

four years to run, and it was acknowledged that the only difference its existence would make to the Defendants was that they would have to purchase the swivels from the Plaintiff at a cost of £50 per annum, instead of making them for themselves. Their utmost loss, if they had not challenged the validity of the patent, would, therefore, have been £200. Am I warranted, under such circumstances, in departing from the rule that there should not be thrown on the litigants the expense of three counsel? In the *North Eastern Railway Company* v. *Jackson* (1) the evidence extended to above 6001 folios, and three counsel only were allowed. In the present case the evidence extended only to 2000 folios; so, according to that proportion, two counsel would well conduct this case. And cases much heavier than this have in this Court been repeatedly conducted by only two counsel. Again, the evidence was all of the same nature. There was, no doubt, a great mass of affidavits, but probably nine-tenths of them were mere surplusage and of no real use, and the excessive amount appears to have been caused by the over anxiety of the parties. The Plaintiff in the first instance filed affidavits to the extent of 240 folios. Then the Defendants put in affidavits amounting to no less than 870 folios, and the Plaintiff, in reply, filed 996 folios; but it was all of the same character. In my opinion, this case might well have been conducted by two counsel, and there was certainly nothing which rendered it imperative that three counsel should be retained.

The rule cannot be better laid down than it was by Lord *Cottenham* in *Attorney-General* v. *Munro* (2), in which, though one of the most important cases which ever came before the Court, he considered that there was no justification for allowing three counsel. *Pearce* v. *Lindsay* (3) involved an immense number of transactions of the most complicated character, and there it was said by Lord *Campbell*, when Lord Chancellor (4), that it was no doubt a general rule to allow only two counsel as between party and party, but that the question was, whether this rule was an inflexible one, and that the authorities of *Smith* v. *Earl of Effingham* (5), *Attorney-General* v.

(1) 22 W. R. 629.
(2) 1 Mac. & G. 213.
(3) 1 D. F. & J. 573.
(4) Ibid. 576.
(5) 10 Beav. 378.

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Munro (1), and *Midland Railway Company* v. *Brown* (2), which had been cited, proved that there might be an exception. He then referred to the fact that the evidence extended over 7050 folios, and was of a very conflicting nature, and had reference to various important questions, and he held that the case was within the exception. Now, upon the rule laid down by Lord *Campbell*, I cannot say that it was essentially necessary in this case that three counsel should be employed.

In *Smith* v. *Earl of Effingham* (3), which was also of great importance, two counsel only were allowed. The rule, therefore, is, that it requires a very strong case to induce the Court to sanction the fees of more than two counsel in taxation as between party and party. I am satisfied, from all the facts of this suit, with which I am perfectly familiar, that two counsel would have been sufficient to conduct it; and I think that if Mr. *Wainwright* had known as much of the details as I do, he would have come to the same conclusion. I must, therefore, disallow the fees and costs consequent upon the employment of the third counsel.

The summons taken out by the Defendants was for the purpose of objecting to the disallowance of a series of items all involving the question of the payment of refreshers to counsel during the continuance of the hearing.

The Defendants set forth several reasons as the grounds of their objection, amongst which were the following:—

That it was now the universal practice at Common Law to pay, and for the Common Law Masters to allow, refreshers as between party and party when a case lasted more than one day.

That since the passing of the Acts of Parliament obliging Courts of Equity to decide questions of fact arising in a suit, and to take cognizance of matters previously decided by Courts of Law alone, instead of directing issues at law, particularly in patent cases, it had been the custom to engage Common Law counsel to attend the hearing and assist the Equity counsel, and that unless refreshers were paid to such Common Law counsel they would not attend.

That it was only just and reasonable, bearing in mind the prac-

(1) 1 Mac. & G. 213. (2) 10 Hare, App. xliv.
(3) 10 Beav. 378.

tice at Common Law, for Masters in Equity to allow payments for refreshers also.

That in such suits it had become the practice to pay refreshers also to the Equity counsel, in order to put them on a footing of equality with gentlemen from the Common Law Bar engaged with them, and that the practice was just and reasonable.

The reasons went on to state facts shewing that a similar course had in fact been adopted by the Plaintiff, and the Defendants were, in fact, driven to follow his example.

The Taxing Master stated as his reason for disallowing the charges for refreshers, that on the hearing of causes in the Court of Chancery where written evidence only was used and no witnesses were examined in Court, it had never been the practice to allow daily fees to counsel where the cause was in hearing more than one day; that no witnesses were examined in Court in the cause; that the employment of a Common Law counsel was not necessary, and no expense resulting from such employment ought to be allowed in costs as between party and party; and that special fees to counsel could not be allowed between party and party.

Mr. *W. Pearson*, Q.C., in support of the summons:—

It is now the rule in all the Common Law Courts to allow refreshers to counsel when the trial of an action at *nisi prius* lasts more than one day; the practice of the Common Pleas, which was formerly different, having been lately assimilated to that of the other Courts: *Laurie* v. *Wilson* (1); and now that the practice of this Court allows of the examination of witnesses orally, it is right that the same fees should be allowed as would be considered proper at Common Law; and this view has already been acted upon in another branch of the Court in *Hill* v. *Hibbitt* (2). It would be unreasonable not to allow some addition to the fees in a case which occupied more than ten days in hearing.

Mr. *Glasse*, Q.C., and Mr. *Freeling*, for the Plaintiff:—

The amount of the fee marked on a brief is generally supposed to have reference to the expected length of time which will be required for the hearing, and is therefore a covering fee; and

(1) Law Rep. 10 C. P. 152. (2) Law Rep. 14 Eq. 221.

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since the system of refreshers had been introduced at Common Law, there would be doubtless a diminution in the amount of the original fee. There is nothing to shew that the original fees in this suit were not on a scale sufficient to cover the entire hearing.

SIR R. MALINS, V.C.:—

I have been informed by Mr. *Follett* that it is the custom in the Taxing Master's office to allow refreshers only in cases in which witnesses are examined *vivâ voce* in Court, when it is supposed that the case is specially assimilated to a Common Law trial at *nisi prius*. Now, from that view I entirely dissent, since it is evident that there may be quite as much difficulty in a case where evidence is adduced by affidavit as by examination *vivâ voce*. The true criterion is the length of time occupied, not how it is occupied; and my opinion is that where the hearing of a case extends over more than two days the Court ought to allow refreshers for the extra time occupied, and that this rule should apply quite as much when the evidence is read as when it is taken *vivâ voce*. In other words, the rule should be fixed on the ground of the time occupied, and not on that of the mode in which the evidence is taken.

On this ground I am inclined to allow the charge for refreshers; but as the original fee may be supposed to cover the second day as well as the first, since in most cases the hearing is not commenced at the beginning of the first day, I shall decide to allow refreshers for eight days only instead of the ten days asked for.

Solicitors: Messrs. *Marriott, Jordan, & Cooper;* Mr. *Letts.*

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1875
Jan. 23, 30;
Feb. 1, 20.

In re UNIVERSAL NON-TARIFF FIRE INSURANCE COMPANY.

FORBES & CO.'S CLAIM.

Fire Insurance—Agent of Company—Misdescription of Buildings—Materiality of Misstatement.

A fire insurance was effected in respect of certain property through an agent named *Donald*, who inspected the premises. One condition of the policy was, that any material misdescription of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate but with tarred felt. The company alleged that *Donald* was not their agent, but the agent of the insured; and that the misdescription rendered the policy void:—

Held, that the misdescription was immaterial, and not sufficient to vitiate the policy; but that if material, it was made by *Donald*, as the agent of the insurance company, and the insured were not responsible for it.

THIS was an adjourned summons in the winding-up of the *Universal Non-Tariff Fire Insurance Company* upon a claim carried in by Messrs. *Peter Forbes & Co.*, of *Port Dundas, Glasgow*, oil refiners, for a loss sustained by the claimants by a fire which occurred in their premises, the subject of a policy issued by the company to the claimants.

The company was incorporated and registered on the 29th of March, 1871. The capital was to be £250,000, divided into 100,000 shares of £2 10*s.* each; but it appeared from the evidence that no more than 1119 shares were ever taken. The claimants being desirous of insuring their premises, entered into negotiation with the company through a person named *William Donald*, who resided at *Glasgow*, and represented himself to be the agent of the company. A policy was effected with the company to the amount of £1550, in four separate risks, on the 8th of September, 1871. The fire took place on the 19th of December, 1871, and a claim for damages was delivered to the company for £1350.

This claim was disputed by the company, and finally an action was commenced by the claimants in the Court of Exchequer against the company on the 24th of February, 1872. The com-

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pany appeared, and pleaded various pleas; and the claimants, believing that the company were vexatiously defending the action, and having ascertained that only £3000 of their capital had been subscribed, presented a petition to wind up the company, which petition was ordered to stand over till after the action had been tried. The action was tried at *Hertford* on the 10th of July, 1872, and a verdict was entered for the Plaintiffs for £1350, subject to a special case and payment into Court of £1000 by the company. The £1000 was paid into Court in the action.

In November, 1872, the company resolved to wind up voluntarily; and in December, 1872, before the special case could be agreed upon, an order was made by this Court continuing the liquidation under supervision. An application was then made for leave to proceed with the special case; but this was refused, and the claimants were directed to establish their claim before the Vice-Chancellor; and an order had since been made in the common law action, that the £1000 should be brought into this Court to be dealt with under the order of the Vice-Chancellor.

The present claim was defended by the liquidators, on the following principal grounds:—First, that *William Donald*, of *Glasgow*, who negotiated the policy between *Peter Forbes & Co.* and the insurance company, was not the agent of the insurance company but the agent of *Forbes & Co.*; secondly, that there were misdescriptions and misrepresentations made by the claimants which rendered the policy void.

Some of the witnesses were cross-examined in Court.

The evidence on the first point was, that *William Donald* held various appointments as agent to insurance companies, and described himself as "Insurance agent;" that he solicited risks from all persons, and effected insurances in several offices; the assured paid him their premiums, and received from him their policies of insurance; he received his commission from the company, and not from the assured, who looked upon him as the representative of the company. It appeared that *Donald* commenced in May, 1871, writing to *Jones*, who was the general manager of this company, about *Forbes & Co.'s* risk, and a long correspondence ensued, which demonstrated, as the claimants alleged, that *Donald* was the agent of the company, and prospectuses and cheque-books for

the receipt of deposits were sent to him to assist him in getting business for the company.

On the 9th of August *Donald* wrote to *Forbes & Co.* for certain particulars, and stated that the company accepted the risk on the terms therein specified, being at the rate of £3 3*s.* per cent. on the buildings, and 31*s.* 6*d.* per cent. on the stock-in-trade.

On the following day, *Forbes & Co.* wrote to *Donald*, as "agent of the *Universal Non-Tariff Company*," shewing that they looked upon him as the company's agent and not theirs. *Donald* himself inspected the buildings, having free access to all parts, and he communicated the particulars to the company.

On the 22nd of August *Jones*, the manager, sent *Donald* a deposit receipt book, and wrote to him thus: "Please do not put the company on risk until advised of the acceptance from here." Subsequently the business was completed by *Donald*, and *Forbes & Co.* paid him the premium. He sent them the policy, indorsed with his own name as agent, and he afterwards received his commission of 15 per cent. from the company.

The company, on the other hand, denied that *Donald* acted as their agent. Their evidence was principally that of their manager, *E. C. Jones*, who stated that he kept a book with a list of the agents of the company, and *Donald's* name was not entered in that list. He only considered *Donald* as a correspondent. Another book had been produced, called the "Proposal Book," in which *Donald's* name was entered as an agent; but *Jones* alleged that the entry was not made by himself, or by his instructions. He acknowledged, however, that the book was kept for his information. *Jones* further admitted, that although the company was advertised with a capital of £250,000, as a matter of fact there was not more than £3000 subscribed.

On the second point, as to misdescription and misrepresentation, it appeared that the first condition of the policy upon which the buildings were insured was in these terms: "Any material misdescription of any of the property proposed to be hereby insured, or of any building or place in which the property to be so insured is contained, and any misstatement of or omission to state any fact material to be known for estimating the risk, renders the policy void as to the property affected by such misdescription, misstatement, or omission respectively." The buildings were described in

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the policy as built of brick and slated. The policy was divided into four separate risks, as applicable to the different buildings. When the fire occurred a high wall, which divided one part of the premises from another, fell down, and disclosed the fact that the roof of that part of the building which was not burnt consisted of tarred felt, and this was the principal misdescription of which the company complained. This roof could not be seen before the fire took place, and there was no evidence to prove that *Forbes & Co.* ever knew of the tarred felt roofing when the insurance was effected. *Donald* went to the premises himself, made his own survey, and wrote down all the particulars, and therefore if a mistake was made, it was made, as the claimants alleged, by *Donald*, and not by themselves.

It was also stated by *Donald*, that *Jones*, the manager of the company, had gone down to *Glasgow* and inspected the premises himself, but the inspection of the premises was denied by *Jones*.

Mr. *Higgins*, Q.C., and Mr. *Langley*, for the claimants, *Peter Forbes & Co.*:—

The two questions raised upon this claim are, whether Mr. *Donald* was the agent of the insurance company; and whether there was any misrepresentation by the claimants of the nature of their premises which would entitle the company to say that the policy has become invalid.

On the first point, we say that the evidence of *Donald* himself is conclusive, and that all the evidence in the case goes to prove what he states. It was *Donald* who solicited the claimants to effect a policy with this company. The evidence shews without doubt that *Donald* was recognised as the agent of the company.

As regards the misdescription of the premises, we have evidence that they were several times carefully inspected by *Donald*, and nothing was concealed from him. There is no evidence of any statement made by the insured as to the nature of the premises, and therefore there could be no misstatement by them.

Mr. *Glasse*, Q.C., and Mr. *Cookson*, for the liquidator of the company:—

The evidence as to *Donald* being the agent does not shew that he was the agent of the company, but the agent of the assured.

He was in the habit of obtaining policies for any persons who wished to effect insurances, and he inspected the premises as the agent of the insured, and gave such information as he was supplied with by *Forbes & Co.* They were consequently liable for any misdescription that was sent to the company. No doubt he received a commission from the company, but this is usual in all cases where business is introduced to an insurance company. It does not prove that he was the agent of the company, and there is no evidence to shew that the claimants considered him as such.

It has been held in many cases that the representations made by the assured must be strictly in accordance with the terms upon which the policy is granted. In this case the first condition of the policy was, that any material misdescription of any of the property proposed to be insured would render the policy void. The premises were described as roofed with slate, whereas a portion of the roof was of tarred felt, which is of an inflammable nature, and is, of course, a serious misdescription of the premises.

The burthen of proof as to the statements made at the time the policy was effected lies upon the claimants to shew that the misrepresentations were not made by them but by the agent, and that they have failed to prove. This principle was laid down in *Parsons* v. *Bignold* (1). We say that if the misrepresentation was made by *Forbes & Co.* it would vitiate the contract, and in default of proof to the contrary by *Forbes & Co.*, it must be taken to have gone from them through *Donald* to the company. The statement in this case was that the buildings were slated; that statement is not borne out, and therefore the policy is vitiated, as was the case in *Newcastle Fire Insurance Company* v. *Macmorran* (2). The same decision was arrived at in *Anderson* v. *Fitzgerald* (3), where a person who effected a policy upon his life failed to answer correctly the questions put to him upon his application to the office. In *Hoare* v. *Bremridge* (4) your Honour said, if you were bound to decide the question, you would follow the case of *British Equitable Insurance Company* v. *Great Western Railway Company* (5), where you had previously decided that withholding a fact from the know-

(1) 15 L. J. (Ch.) 379.
(2) 3 Dow. 255.
(3) 4 H. L. C. 484.
(4) Law Rep. 14 Eq. 522.
(5) 38 L. J. (Ch.) 132, 314.

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ledge of the insurance company which ought to have been known by them, was a concealment which vitiated the transaction. That was also the decision in *Bates* v. *Hewitt* (1), and *Macdonald* v. *Law Union Fire and Life Insurance Society* (2).

There is no evidence to shew that Messrs. *Forbes & Co.* ever stated this roof to be of felt, therefore it must be taken as a statement by them that it was of slate, since it was the duty of any member of the firm in going over the premises with *Donald* to point out to him that the roof was of felt. You cannot go into the materiality of the misstatement, because it is part of the contract that the buildings are of brick and slated. The evidence therefore, is of very little importance. It is or it is not in the terms of the contract. If it turns out that the roof is of felt and not of slate, then it is not the contract entered into, and consequently the policy must fail.

Mr. *Higgins*, in reply:—

Most of the cases cited go upon this principle, that, where there is an express warranty comprised in the contract for a policy, then a variation in the terms of the warranty is fatal, and the materiality of the misdescription would be of no consequence. That was the only ground of the decision in the *Newcastle Fire Insurance Company* v. *Macmorran* (3). The difference in this case is that we were not called upon to make any representation whatever. *Donald* says that he went over the premises himself with *Townsend*, one of the firm of *Forbes & Co.*, and that he had every facility given him for inspecting the premises. It has been argued that the whole case stands upon warranty, and that you cannot go into the question of materiality; but warranty is not the basis of this contract. The policy says that any material misdescription of the premises shall render the policy void. Then it is imperatively necessary to shew the materiality of the misdescription if there is any, and it appears in the result that only a small portion of the premises, which was insured at a value of £200, was roofed with felt, because the premises were divided with respect to the premium paid, and that small building was not burnt. We insisted upon four separate

(1) Law Rep. 2 Q. B. 595. (2) Law Rep. 9 Q. B. 328.
(3) 3 Dow. 255.

risks, and this felt-roofed building was one of the separate risks. The question is, whether this mis-statement is material, and we say it is not. It is a variation which is of no consequence, such as the variation in the case of *Towle* v. *National Guardian Insurance Society* (1), which was held not to vitiate the policy, and in *Benham* v. *United Guarantee and Life Assurance Company* (2). The principle of the law is clearly stated in *Smith's* Mercantile Law (3), shewing that if the description of the property be substantially correct, the error is not material; and *Story* on Evidence (4) confirms that view of the law.

Feb. 20. Sir R. Malins, V.C.—

This company was incorporated and registered on the 29th of March, 1871. The capital was to be £250,000, divided into 100,000 shares of £2 10*s.* each. The company was a failure from the beginning, for it appears from the evidence of Mr. *Jones*, the manager, on his cross-examination of the 16th of December, 1873, that no more than 1119 shares were ever taken, producing a capital of £2817 10*s.* (assuming the shares to be paid in full, which they were not), out of which the expenses of forming the company had to be paid; and with this capital they had the boldness—I may say, audacity—to begin the business of fire insurers, and to hold themselves out as a substantial company, with a sufficient capital to meet all demands that could be made upon them. It is plain that this was an imposition practised on the public, for which all the parties concerned in it ought to be answerable. The claimants in this case were in 1871 carrying on business as manufacturing chemists and paraffin oil makers at *Port Dundas, Glasgow*, and, believing the representations made by this company, they had the misfortune to open negotiations with them for an insurance on their manufactory in the month of May, 1871, which resulted in their effecting a policy with them on the 8th of September following for the sum of £1550. The insured property was destroyed by an accidental fire on the 23rd of December

(1) 3 Giff. 42. 7 Jur. N.S. 619 (3) 8th Ed. p. 405.
(2) 7 Ex. 744. (4) 3rd Ed. pl. 58, p. 70.

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(1) Revd 7 Jur. N.S. 1109. 30 L.J.C.L. 908

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following, by which the claimants have sworn that property covered by the insurance to the value of £1350 was destroyed. The claim for this amount was sent to the company in the usual course, and I have no doubt it would have been promptly met if they had been in funds; but the facts I have stated shew that they were not in a situation to meet the demand, and the consequence was that, as might have been expected, objections were taken to the validity of the policy, which would not have been thought of if it had not been for the state of poverty and insolvency of the company. It appears from the cross-examination of the same Mr. *Jones*, the manager, that when the demands of the claimants under the policy ought to have been satisfied, namely, in April, 1872, the balance of the company at their bankers was £20, and that they had the command of between £200 and £300 altogether, though, upon being pressed, he declined to say where it was. The claimants being unable to obtain satisfaction of the demand under the policy, presented a petition to wind up the company on the 20th of March, 1872. That petition came on to be heard before me on the 31st of May following, when it was resisted on the ground that the company disputed their liability under the policy, and therefore the debt upon which it was founded; but they stated, most erroneously, as it now appears, that they were perfectly solvent and able to pay the debt of the petitioners if they proved it. The debt in respect of which the petition was presented being thus disputed, I ordered the petition to stand over until the petitioners had proved their debt. For the purpose of doing so, they immediately brought an action against the company, which was called on for trial at the Summer Assizes at *Hertford* on the 10th of July, 1872, but as there was not sufficient time to try the case, a verdict was taken for the petitioners for £1350, subject to a special case. For some reason, which has not been explained, the Judge who tried the case appears to have required the company to pay £1000 into Court, which they accordingly, by some means, did. Before anything further had been done, the company resolved to wind up voluntarily in November, 1872, and another creditor having presented a petition to wind up the company, upon that petition an order to continue the voluntary winding-up under supervision was made

by me in December, 1872. Under this order Messrs. *Peter Forbes & Co.* have claimed the £1350, which they say is due to them under the policy, as a debt against the company; and their demand being resisted by the liquidator, I have to decide the question which has been raised as to the validity of the policy. I should state that the premium paid on the policy was at the rate of £3 3*s.* per cent. on the buildings, and 31*s.* 6*d.* per cent. on the stock-in-trade. These, I am informed, are about the largest premiums ever paid, and it may, therefore, have been well supposed by the insured that they paid such to cover all risks. But the liability under the policy was resisted, on the ground that there was such a misdescription of the property insured as to render it void; and that misdescription consists in a statement that the buildings were slated—that is, roofed with slate; while one of them, the still and boiler-house, was roofed with felt. The insured contend that this is not such a misdescription as to vitiate the policy, and that if it could have that effect, it would only do so as to the particular building, to which a liability of £200 only was attached, which they say became unimportant, as that building was not destroyed or affected by the fire. And they also contend that if the misdescription was important it was not made by them, but by Mr. *Donald*, who was the agent of the company at *Glasgow*, to inspect the property for the purpose of fixing the amount of the premium, and that he forwarded the description to the company without having been told by them what the roof was, or having made any inquiry of them on the subject. Now as to the materiality of the misdescription, the first condition indorsed upon the policy was as follows:—"Any material misdescription of any of the property proposed to be hereby insured, or of any building or place in which the property to be so insured is contained, and any mis-statement of or omission to state any fact material to be known for estimating the risk, renders the policy void as to the property affected by such misdescription, mis-statement, or omission respectively."

It is suggested, on the part of the company, that they would have refused the risk if they had known of the felt roof; but I am satisfied they would not have done so, and that a higher premium would not have been required, and I do not, therefore,

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consider that it was a material misdescription within the meaning of the first condition of the policy, and I am satisfied that no such defence would have been set up if it had not been for the state of poverty of this company, to which I have already referred.

Several cases were cited by the counsel for the liquidator, for the purpose of justifying the defence. There is no doubt that if a description is in the form of a warranty, or amounting to a warranty, it must be strictly true, or the policy will be void. This is the point decided in the case of *Newcastle Fire Insurance Company* v. *Macmorran* (1) decided by the House of Lords—that is, by Lord *Eldon*, and the decision is of the highest authority. That was a case in which the property by the rules of the society was divided into two classes. It was a manufactory, and the insured gave a statement that it was of the class number one, and therefore paid a smaller premium. The Courts in *Scotland* had decided even there in favour of the validity of the policy, but Lord *Eldon* took the view that it was a warranty; that there was a positive statement that it was of class one, and therefore as the warranty was not borne out, the policy was void. Lord *Eldon* says (2): "But if the mill was warranted as of the first class, and was really of the second class, the judgment of the Court below was truly erroneous; for it is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shewn; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact." The case of *Parsons* v. *Bignold* (3) which was cited by Mr. *Cookson*, and much relied upon, was this: there was a policy on a life for which property was held; certain representations were made in the particulars, which turned out to be untrue, as to the nature of the interest. The representations were made by the insured to an agent of the office; the agent of the office did not write all the information he got from the insured at the time, but half an hour after the insured had left him; and the question was, whether the representation was made by the

(1) 3 Dow, 255. (2) 3 Dow. 262.
(3) 15 L. J. (Ch.) 379.

insured or whether there was a mistake made by the agents of the insurers. If the mistake was made by the agents of the insurers, then, of course, the policy was valid; if the misrepresentation was made by the insured himself, then the policy was void. The assured filed a bill in Chancery, before Vice-Chancellor *Knight Bruce*, to have the policy corrected, and in that form of proceeding the burden of proof was upon him to shew that the misrepresentation was not made by him, but by the agent of the insured. The agent of the insured was examined, but could not recollect what passed—he could make no positive statement on the subject. Therefore, inasmuch as the burden of proof was on the insured, the Plaintiff, Vice-Chancellor *Knight Bruce* dismissed the bill, inasmuch as he had not discharged himself of the proof which he was bound to give. That was appealed, and came on before Lord *Cottenham*, who took the same view. Therefore the case failed because the burden of proof being on the Plaintiff, he failed to prove that which was essential in that particular form of relief. But it was assumed throughout that if the misrepresentation had been the fault of the agent of the insurance company the policy would have been valid.

The case of *Anderson* v. *Fitzgerald* (1) was cited and much commented upon. It is a well-known authority; and that is a case also in which it will be remembered the original Court of Queen's Bench in *Ireland* and the Exchequer Chamber in *Ireland* had decided in favour of the validity of the policy. That was reversed by the House of Lords. The case was this: There was a policy on a life, and a proviso in the policy that if any fact which was the basis of the insurance was misstated, the policy should be void. Two questions were asked of the insured: "Have applications been made to any other office to insure? Answer: No. Have any members of the family died of consumption? No." Now both these representations were false; and there being a proviso that any misstatement on the policy of a material fact should vitiate it, it followed, in the judgment of the House of Lords, that the policy was void from the beginning.

Bates v. *Hewitt* (2) was also cited. That was the case of an

(1) 4 H. L. C. 484. (2) Law Rep. 2 Q. B. 595.

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insurance on the ship *Georgia*. The ship *Georgia* was well known in all parts of *England* and elsewhere as one of the Confederate cruisers. The person who effected the insurance did not state the fact that it was the *Georgia*, which had been a Confederate cruiser, and having been a Confederate cruiser she was liable to be seized by the Federal Government of *America;* she was accordingly seized, and the question was, whether the insurers were liable. It was held that they were not, because that was a suppression of a fact most material to be known by the insurers, since they insured against the perils of the sea, whereas this was not a peril of the sea, but a peril of being captured by a government against whose laws she had been engaged. In giving judgment, Lord Chief Justice *Cockburn* says that which has been said on many other cases, "The party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the insured."

With regard to the roof in this case, whether it was felt covered with tarpaulin or slate in my opinion would have made no difference whatever.

The case of *Macdonald* v. *Law Union Fire and Life Insurance Society* (1), cited by Mr. *Glasse*, goes on the same principle. There was a positive statement made with regard to the life, which statement proved to be untrue, and there was a condition in the policy that if any statement was not accurately true the policy should be void.

These authorities do not in my opinion apply to the present case, but the principle applicable to this case is, I think, that stated in *Smith's* Mercantile Law (2), "If the description of the property be substantially correct, and a more accurate statement would not have varied the premium, the error is not material." Amongst the authorities which Mr. *Smith* cites for that is *Doe* v. *Laming* (3), where there was a lease granted upon a condition that the property should be kept duly insured. It was insured at common hazard, but there was a condition in the policy that the

(1) Law Rep. 9 Q. B. 328.
(2) 8th Ed. p. 405.
(3) 4 Camp. 73.

premium was to be forfeited if it was used as an inn, and the landlord brought an action of ejectment against the tenant on the ground of a breach of contract to insure. The question turned upon whether the house kept by the tenant was an inn or a coffee house, because if it was an inn the insurance company considered that the trade of an innkeeper was doubly hazardous. Lord *Ellenborough* said that *Grigsby's Coffee House* was like any other coffee house, and was not an inn within the meaning of the policy.

The case of *Benham* v. *United Guarantee and Life Assurance Company* (1) was cited by Mr. *Higgins* for the claimants. That was a case in which the integrity of a tax collector was to be assured by the society. Amongst the statements was one made as the basis of the insurance that the accounts should be settled every fortnight. They were not so settled, and that was held by the Court of Exchequer not to vitiate the policy. It was not considered as an essential or important condition of the policy, but a mere statement.

The case of *Towle* v. *National Guardian Insurance Society* (2), before Vice-Chancellor *Stuart*, was also cited and relied upon by Mr. *Higgins*.

I had not the book at the time, but when I took up the report I found in a note to the case, "In this case the Lords Justices differed from His Honour, and reversed the decree." Therefore I cannot rely upon that for the purpose for which it was cited. But there is a material statement that a tax collector, having to collect more than £9000 a year, his statement was that he should never have more than £50 in his hands at a time, because he would settle weekly, and therefore divided the amount by 52, whereas at the quarterly collection he frequently had as much as £2000 or £3000. That was held to amount to a misstatement which would vitiate the policy.

On these grounds, therefore, I come to the conclusion that there is no such misdescription in the policy as would have the effect of voiding it if it had been made by the insured themselves.

But, assuming this description to be material, I am of opinion it

(1) 7 Ex. 744. (2) 3 Giff. 42.

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was made by *Donald* as the agent of the company, and that the insured were not answerable for it.

It was strongly contended by the counsel for the liquidator that *Donald* was not the agent of the company, but the correspondence between him and Mr. *Jones*, the manager of the company, completely shews that he was their agent, and this part of the defence was virtually given up. The proposal for the insurance was made by him in a letter dated the 30th of May, 1871, and the correspondence between him and the company was continued down to the date of the policy, and afterwards, and throughout that correspondence he is treated as the agent of the company, and in their books he is stated to be so.

A great number of letters were read on the part of the liquidator. It is not necessary to go through them; but there is one dated the 22nd of August, 1871, before the policy was effected, from Mr. *Jones*, the manager, to Mr. *Donald*, which conclusively shews that he was the agent of the company. There are several policies mentioned, and of course, therefore, he was writing and was written to as the agent of the office—*Peter Forbes & Co.* is one of them, the policy now in question. Mr. *Jones*, the manager in *London*, writes to Mr. *Donald*, in *Glasgow*, "This is accepted, less a reduction of £350 in the third item, making a total of £1550," which is the amount for which the policy was issued; "please send exactly wording of the policy." Now comes the passage, which I think conclusively shews that they treated him as their agent. "I send deposit receipt book; please do not put the company on risk till advised of its acceptance from here." How could *Donald* put the company on risk, if he was not their agent? Was he the agent of the company to inspect and describe the property of the insured? Mr. *Donald's* affidavit of the 25th of April, 1872, contains a statement upon which there has been much cross-examination, and which, in my opinion, has not been in the slightest degree shaken. Mr. *Donald*, I am bound to say, appears to me to be a man of truth, and straightforward feeling. I cannot say I have the same impression of all the other parties concerned. Mr. *Donald*, in that affidavit, says: "I solicited the petitioners for business, and ultimately got an offer from them to

insure their building sand stock, and I submitted the offer to the Defendants on the 30th day of May, 1871. I had a good deal of trouble with the risk, on account of its being a somewhat hazardous one, and the company being particular about the details, I examined the premises several times, and made a sketch of them for the use of the office, at the request of the manager. The company had no surveyor in *Glasgow* at that time. I acted in the capacity of a surveyor in examining the buildings, making the sketch referred to, and giving the necessary information to the office. I had every access to all parts of the premises, and was furnished by the petitioners with all the information that I wished. I consider that the building, stock, and machinery which I saw was worth from £10,000 to £20,000, and I considered the petitioners' risk the best of its kind I had seen. I have seen every oil refinery in *Glasgow*. After the said 30th day of May, I received a letter from Mr. *Jones*, the manager of the said company, to the purport that he was coming to *Glasgow*. Mr. *Jones* did come to *Glasgow*, and he called upon me and had a conversation with me regarding the risk, and gave me to understand that he had come to *Glasgow* to examine this and other risks, and he then authorized me to give to the petitioners a deposit-receipt for the interim insurance, which I did, upon receiving a deposit." It is sworn by Mr. *Donald*, that *Jones* having gone to *Glasgow*, told him he had been and looked at the place and examined the place insured. *Jones* says, he never did go to see that place. Why he went to *Glasgow*, except to do his duty in that way, I cannot see. However, there is the contradiction. Which is correct I cannot tell; but that he told *Donald* he had been there I have no doubt whatever, for I am satisfied *Donald* is a man of truth.

Mr. *Townsend*, who was one of the partners in the firm of *Forbes & Co.*, states that there was no misdescription whatever of the premises, and no omission to state any facts material to be known to the company. That the description was not supplied by the insured but by the agent *Donald*, after he had repeatedly and carefully inspected the premises, for which inspection all facilities were given by the firm.

I may further remark, that if this company had attached any

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importance to the representations made by the insured, it was their duty to have a written statement, whereas from the beginning to the end not one scrap of writing is produced of any statement whatever made by the insured. It is, therefore, in my opinion, a case in which the principles of common sense will apply, where property of this description, upon which forty times the common hazard premium was paid, was insured. They appear to have said, You must send your agent or surveyor to look at the place, and tell us upon what terms you will take the policy. That, in my opinion, was done, and that is the basis of the insurance.

Upon a careful consideration of this evidence, and of the other evidence in the case, I am of opinion that the description of the property was given to the company by *Donald*, as their agent, and did not proceed from the insured at all, and they are not responsible for the mistake which was made as to the roof, or for any other misdescription of the property.

I am, therefore, of opinion upon the whole, that the insured have established their right to stand as creditors against the company for the damage sustained by the fire, not exceeding the sum of £1350, which they claimed in the outset, and I am also of opinion that the £1000 paid into Court in the action must be applied in or towards satisfaction of the amount for which they may prove themselves to be creditors. I suppose the amount of the loss must be ascertained in Chambers if it is disputed. The claimants must have their costs at law and in this Court.

Solicitors for the Claimants: Messrs. *Flux & Co.*
Solicitors for the Liquidator: Messrs. *Wilkins & Blyth.*

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March 1, 2.

[1867 P. 4.]

Will—Specific Legacy—Designation of Existing Fund—"£4500 Money in the Funds"—Bequest of the Interest of a Fund—"Any small Balance remaining in the Bank."

Gift by will in the words, "I give to my dear sister *A. M. D.* the interest of £4500 money in the funds for her absolute use and benefit;" followed by specific gifts to the same legatee and the words "and at her decease to *M. A. H.*, the funded property to *H. Y.*" The testatrix had, at the date of her will, an absolute interest in about £4000 consols in the names of trustees:—

Held, a specific gift of the £4000 consols for the benefit of the sister for life, with a gift over to *H. Y.* absolutely.

Gift of "any small balance remaining in the bank after payment of my funeral expenses."

The testatrix had, at the date of the will, a balance of £480 at her bankers, which had increased to the amount of £1373 0*s.* 10*d.* at her death:—

Held, that the whole balance passed.

ANNE ALICIA JULIA DENDY made her will, dated the 19th of November, 1859, which, omitting formal parts, was as follows:—

"This is the last will and testament of me, *Anne Alicia Julia Dendy*, of *Feltham, Middlesex*, spinster. I give to my dear sister *Albinia Martina Dendy* the interest of £4500 money in the funds for her absolute use and benefit; and I appoint *Heathfield Young*, of *Dorking*, in the county of *Surrey*, solicitor, executor of this my will. And I also give to my sister *Albinia Martina Dendy* all my household furniture, linen, glass, china, and books, wardrobe, and at her decease to *Mary Ann Harris;* and to *Heathfield Young* the funded property, subject to an annuity of £30 per annum to *Mary Ann Harris*, confidential servant of myself and my dear mother's. I also give to her the shares in the *New River Company* and a small sum in *St. Martin's Savings Bank;* and the seven large best pictures and the large portrait of Mr. *Dendy* to *Heathfield Young*, the £536 in the *Bank of England*, *Walthamstow* shares, cemetery shares, and *Equitable* shares to *Heathfield Young*. I give to *Albinia Daubeny* my *Sheppy Farm*, subject to £50 a year

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to be paid for the use and benefit of my sister *Albinia Martina Dendy*. I give, also, to *Albinia Daubeny* my pearls. I give to my brother *Arthur Hyde Dendy* and to my uncle *Robert Page* the thousand pounds left in my father's will, and my grandfather's and grandmother's pictures, and any small sum remaining in the bank after my funeral expenses have been paid, to my uncle *Robert Page;* and it is my particular wish that *Heathfield Young* shall purchase and have a new tomb made at *Kensal Green* as near to my dear mama's as possible."

The testatrix died on the 19th of February, 1866, leaving her brother *Arthur Hyde Dendy* her heir-at-law, and himself and her sister *Albinia Martina Dendy* her sole next of kin.

The testatrix was possessed at her death of several sums of consols standing in her own name, amounting together to the sum of £536 and to the sum of £4013 15*s.* 5*d.* consols, which at the date of her will stood in the names of trustees for her, and was transferred into her own name on the 15th of January, 1862, and it remained so invested till her death. Her usual bankers were Messrs. *Bosanquet & Co.*, and at the date of her will her balance with them was £480. At the time of her death the balance had increased to £1373 0*s.* 10*d.* She had also at her death a sum of £120 7*s.* in the *St. Martin's Savings Bank.*

The validity of the will was contested by *Arthur Hyde Dendy*, but after considerable litigation it was established. There was a very small residue undisposed of, which was insufficient to bear the portion of the costs of the litigation thrown upon the estate.

The present bill was filed by the testatrix's uncle, *Robert Page*, the legatee of that name, and now came on for further consideration. Several questions of construction arose upon the will.

The first point argued related to the gift of £4500, money in the funds.

Mr. *Glasse*, Q.C., Mr. *J. Pearson*, Q.C., and Mr. *Shebbeare*, for the Plaintiff:—

The gift of the £4500 is a general legacy, and is therefore liable to abate, and to bear a proportion of the costs. There is no reference to any particular fund in existence, and if the testatrix had no funded property existing at her death, it would have been the

duty of the executor to purchase sufficient to answer the legacy. It is, moreover, clear that the sister was only intended to take a life interest in the fund, and that the same fund was intended to be given to *Heathfield Young* by the expression "the funded property."

Mr. *Bristowe*, Q.C., and Mr. *Hemming*, for *Albinia Daubeny*:—

Without an express reference to a particular fund as existing at the date of the will, a legacy cannot be specific. *Oliver* v. *Oliver* (1). The £536 was given by an independent bequest, leaving only the £4013 15*s.* 5*d.* in the names of trustees which could possibly be treated as referred to; and the amount and position of this fund shew that it could not be meant by the £4500 spoken of in the will, which must be a mere general legacy.

The VICE-CHANCELLOR:—A similar point arose in *Cole* v. *Scott* (2). As counsel, I argued that the existence of the word "now" made no difference; but Lord *Cottenham* took the opposite view. *Doe* v. *Walker* (3) was cited as governing the case.

Mr. *Cotton*, Q.C., and Mr. *Pemberton*, for *Arthur Hyde Dendy*, who was the legal personal representative and sole next of kin of *Albinia Martina Dendy*, who had died since the institution of the suit:—

The bequest of the £4500 money in the funds is specific, and applies to the £4013 15*s.* 5*d.* consols, and it is also given absolutely. There is an unlimited gift of interest; without a gift over it carries the principal: *Haig* v. *Swiney* (4). There is nothing in the terms of the gift to *Heathfield Young* referring to the £4500 in the funds, or any expression implying it to be a gift over of anything previously dealt with. The word "my" is not required to make a gift specific: *Hosking* v. *Nicholls* (5); *Vaughan* v. *Buck* (6). Under a specific gift of stock a smaller amount than that named in the will will pass: *Ashton* v. *Ashton* (7); *Page* v. *Leapingwell* (8).

(1) Law Rep. 11 Eq. 506.
(2) 1 Mac. & G. 518.
(3) 12 Mee. & W. 591.
(4) 1 S. & S. 487.
(5) 1 Y. & C. Ch. 478.
(6) 1 Ph. 75.
(7) 3 P. Wms. 384.
(8) 18 Ves. 463.

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Mr. *Higgins*, Q.C., and Mr. *Millar*, for *Heathfield Young*:—

There can be no doubt that the true construction of the clause is that it gives a life interest to Miss *Dendy* with a gift over of the same fund on her death. Now if the first gift is specific, the second must of necessity be so also; but it by no means follows that if the first is general the second is not specific. What is given over is "the funded property," and that clearly means the funded property belonging to the testatrix at her death, and *Heathfield Young* must take that as a specific legacy: *Bethune* v. *Kennedy* (1).

Mr. *Glasse*, in reply:—

Nothing turns upon the expression "funded property" used in the second part of the will. There is, first of all, the gift of the £4500 for life, and then the same fund is alluded to as the funded property. As to the £4500 money in the funds, there is nothing to point to any existing fund. The executor would have been obliged to buy a sufficient amount of stock if none had existed.

All the cases on the subject, such as *Oliver* v. *Oliver* (2), *Sibley* v. *Perry* (3), *Bronsdon* v. *Winter* (4), *Vaughan* v. *Buck* (5), *Ashton* v. *Ashton* (6), *Robinson* v. *Addison* (7), *Bethune* v. *Kennedy*, point to the necessity of finding words in the will pointing to an existing fund.

The next point argued was as to what passed under the words, "any small sum remaining in the bank after my funeral expenses are paid."

Mr. *Glasse*, Q.C., Mr. *J. Pearson*, Q.C., and Mr. *Shebbeare*, for the Plaintiff:—

The testatrix must have referred to her bankers, Messrs. *Bosanquet & Co.*, and the gift carries the whole of the balance standing to her credit at their bank after payment thereout of funeral expenses.

The VICE-CHANCELLOR:—This is rather like the gift of "all

(1) 1 My. & Cr. 114.
(2) Law Rep. 11 Eq. 506.
(3) 7 Ves. 522.
(4) Amb. 56.
(5) 1 Ph. 75.
(6) 3 P. Wms. 384.
(7) 2 Beav. 515.

my little property and effects" in *Hill* v. *Tate*, which was before me on the 16th of December, 1874.

Mr. *Higgins*, Q.C., and Mr. *Millar*, for *Heathfield Young*:—

The terms of this gift leave the construction too indefinite to allow the Court to say that the Plaintiff can take so large a balance. If there had been only a small balance the Plaintiff might have taken it; but as there was a large one he cannot take anything at all.

Mr. *Bristowe*, Q.C., and Mr. *Hemming*, for *Albinia Daubeny*:—

The testatrix, having previously described the *St. Martin's Savings Bank*, must be understood as referring to the same bank when she afterwards alludes to her bank: *Webber* v. *Corbett* (1).

SIR R. MALINS, V.C.:—

On the last question it has been found that the testatrix's usual bankers were Messrs. *Bosanquet & Co.*, and I think it must be presumed that she intended to refer to them by the words in question. As to Mr. *Bristowe's* argument, I think if she had meant the savings bank she would have said so, or would have called it "the said bank."

It is found that she had at the time of making her will a balance of £480 at her bankers, and if she had died the same day the balance, after payment of her funeral expenses, would have belonged to the Plaintiff.

It happened that she lived for some years afterwards, and the balance increased to £1373 0*s.* 10*d.*; and it is argued that because she has increased the balance the Plaintiff must take nothing. I adhere to my former decision in *Hill* v. *Tate*, where it was argued that the expression used must refer simply to the small things about the testator. In my opinion I must reject the word "small," and read the clause as if it had run "any sum remaining after payment of my funeral expenses." I am, therefore, of opinion that the Plaintiff takes the whole balance.

On the question whether the legacy of £4500 money in the funds is specific or general, a great number of authorities have been cited; but I think that the point is, after all, a simple one.

(1) Law Rep. 16 Eq. 515.

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The principles of the Court are plain. If a testator gives a thing which he has as "money now in the funds," "money now in a box," or "money now in a stocking," or a specific chattel, or anything which can be distinctly earmarked, as the thing which he intended to give, that is a specific legacy. But if he gives a sum of money, as £10,000 consols, without saying that the consols are the consols as they now exist, and it merely means a gift of so much stock, that is a general legacy; and if he has not the amount at the time of his death, it is provided out of his general estate, so that, like any other legacy, it must be paid as far as his assets will go. The consequence of this is, that there are several advantages which a specific legatee has, and there are several disadvantages to which he is exposed. He has the advantage that if the assets are deficient, he takes the very thing bequeathed to him without any abatement. On the other hand, if the testator sells the thing given, the legacy fails altogether. That is a very great peril to which he is exposed, and on that account it is that the inclination of the Court has always been rather against than for holding legacies to be specific.

Now with regard to this testatrix, I must look at all the surrounding circumstances. At the date of her will in November, 1859, she had a sister and a brother. Her sister, it is admitted, was in a state of imbecility, and absolutely incapable of making any will or disposition of her property; and I collect from all I have heard that the testatrix was not on very amicable terms with her brother. It is very seldom that a woman who has a brother makes persons such as uncles and aunts and cousins the donees of her property. But this lady gives a considerable part of her property to her cousin *Heathfield Young*, and another considerable part to her uncle, the Plaintiff, from which circumstance I infer that she could not have been on affectionate terms with her brother. She may have thought that he did not require more property, but such a feeling does not usually induce persons to prefer their more remote relations. These things are only material in order to enable the Court to put itself into the position of the testatrix, and to see what she meant by the words of her will. It is found as a fact that she had in the funds a sum of £4013 15*s.* 5*d.*, and there are two questions that arise: first, whether the legacy is specific, and secondly, whether it is given for life only, or absolutely? I pre-

sume that it could not have been her object to give her sister the disposal of the capital; because I must attribute to her the knowledge that if her sister died her brother would take it as her sole next of kin (she being incapable of making a will); but it is highly probable that she intended to increase her comforts by giving her the income during her life.

I have stated what I apprehend to be the general rule as to specific legacies; and it is admitted, and the case of *Ashton* v. *Ashton* (1) has been cited to me to shew, that the gift of a larger sum of stock specifically will pass a smaller. It was a bequest of £6000 *South Sea* Stock, when the testator only had got £5300 odd. That was held to be a specific legacy, and to pass the £5300 stock. Therefore the bequest of £4500 stock in a will will pass a smaller sum if the testatrix had only a smaller sum. Did she intend to direct that there should be provided for her sister £4500, or did she intend to give the fund already existing? I quite agree that the will may mean either. Many cases were cited to me, particularly *Bronsdon* v. *Winter* (2) and *Sibley* v. *Parry* (3), where the money was to be "transferred." It was held that "transferred" might mean that which the executor already got or procured to be transferred by buying it. Lord *Eldon* came to the conclusion that the legacy was not specific, that the word "transferred" might refer to that which had already been or might be procured to be transferred by buying, although his own opinion was in favour of construing even such a legacy specific. *Bronsdon* v. *Winter* was the case of a bequest of money upon a particular security. The words were, "I give, devise, and bequeath unto the said *William Ikes* and *George Ikes* the sum of £2000 capital stock in the *South Sea Company*." It is not "now" in that company. If the testator had £2000 *South Sea* Stock, he may very well suppose him to have meant to give that very stock that he had. A representation was made in the case that such stock was not purchasable, and if that had been completely proved, it would have been a very strong circumstance for saying that the testator intended to give that which he then had. It turned out that the supposition was incorrect; and it was simply difficult to procure, and it was just as if the gift had been of £1000 Consoli-

(1) 3 P. Wms. 384. (2) Amb. 56. (3) 7 Ves. 522.

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dated Bank Annuities. Now, if the form of expression here means money already in the funds, the legacy is specific, but if it only means money to be bought in the funds, it is general. I am of opinion, looking at the situation of the testatrix, that she intended it to mean "my money in the funds," that is, money already in the funds. She did not intend the money to be bought in the funds, but she intended to give the money which was then in the funds. In coming to that conclusion, I may say that the cases, no doubt, are many of them very close, and the distinctions refined; but, considering all the surrounding circumstances, I come to the conclusion that she intended to give to her sister for her life the whole of the money she had in the funds, except the £536 which was given to Mr. *Heathfield Young* specifically. I come, therefore, to the conclusion that this is a specific and not a general legacy.

Then as to the question whether this fund is given absolutely or for life, I agree with all that has been stated to the effect that the rules of this Court are perfectly settled that an indefinite gift of the interest of money will pass the capital, or an indefinite gift of rents and profits of real estates will pass the fee simple. Formerly it would not pass more than a life estate without words of inheritance, but we do not want words of inheritance now. It is the land which produces the rents and profits, and they being given indefinitely will pass the entire interest. But, looking to all the circumstances, nothing is more improbable than that the testatrix intended to give to her imbecile sister the *corpus* of the £4500. If the will had stopped at the words "the interest of £4500 money in the funds for her absolute use and benefit," I should have been bound to come to the conclusion that the sister took the property absolutely. But every part of the will must be looked at, and the only funded property being this sum of £4013 15*s.* 5*d.* and the £536 which is specifically bequeathed, the testatrix, in another part of the will, says, "I give to *Heathfield Young* the funded property." After the gift of the £4500 funds for her absolute use and benefit, she says, "I also give my sister *Albinia Martina Dendy* all my household furniture, linen, glass, china, and books, wardrobe, and at her decease to *Mary Ann Harris*." She gave the furniture to her sister in order that she might be more comfortable, and then she says "at her decease,"

that is, her sister's decease, "to *Mary Ann Harris*." The sister is to have the furniture for life, and then it is to go to *Mary Ann Harris*, and at the same period of her decease she fixes the funded property by giving it to Mr. *Heathfield Young*.

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Upon the whole, there is quite enough to take this case out of those which make an indefinite gift of interest a gift of the capital because the capital is after death given in another way. I come to the conclusion, therefore, that it is a specific legacy, and, secondly, that she intended it for her sister for life only, and that the reversion passed to Mr. *Heathfield Young*.

Solicitors: Mr. *Henry Gover*; Messrs. *Raven & Hare*; Messrs. *Woodbridge & Sons*; Messrs. *Watson & Sons*.

DOSS *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

V.-C. M. 1875 *March* 8, 9, 10.

[1874 D. 84.]

Annexation of the Kingdom of Oudh—Rights of the East India Company—Sovereign Act of State—Want of Jurisdiction—Improper Tribunal—Demurrer.

The Plaintiffs, who represented certain creditors of the King of *Oudh* in respect of a debt contracted in 1794, sued the Secretary of State for *India*, claiming to be entitled to a charge upon the revenue of the territory of *Oudh*:—

Held, upon demurrer, that as the debt was one which there were no means of enforcing against the King of *Oudh* before the annexation in 1856, neither could it have been enforced after the annexation against the *East India Company*:

Held, also, that the annexation of *Oudh* having been a sovereign act of State by the *East India Company* as trustees for the British Government, that act could not be reviewed by any municipal Court, and the bill was therefore not sustainable:

Held, also, that the Plaintiffs being natives of *India*, the subject-matter being in *India*, and the Defendant being capable of being sued in *India*, an English Court of Equity was not the proper tribunal to try the question between the parties:

Held, also, that the staleness of the demand and the impracticability of giving effect to any declaration of right were grounds for allowing the demurrer.

THE bill stated that in the years 1794 and 1795 *Monohur Doss* and *Dwarka Doss* carried on the business of bankers at *Calcutta*,

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and during those years the said bankers advanced large sums of money to the Nawab *Asophoo Dowlah* for the purposes of the State of *Oudh*.

The advances, which amounted in the whole to 846,700 rupees, were made upon memoranda stating that the several sums were lent for the use of the Nawab, and it was agreed that such sums should be paid out of the revenue of the territories, with interest varying in the memoranda from 2 to 3 rupees per cent. per month, and one of the memoranda described the money as payable out of the revenue of the territories for a particular year. The claim made by this bill applied to the advances made by *Dwarka Doss*, and the four Plaintiffs to this suit were alleged to be the sole heirs and next of kin, according to the Hindoo law, of *Dwarka Doss*. The bill further stated that these sums of money were lent to the Nawab of *Oudh* for the purpose of discharging certain arrears due to the *East India Company*.

In the year 1795, in consequence of an attempt on the part of the *East India Company* to ascertain, for the purpose of having the same paid off, the amount of the debts due by the Government of *Oudh*, a list was prepared by the late Prime Minister, *Tickait Roy*, by the direction of the Nawab, which list contained the following sums:—236,000 rupees to *Monohur Doss*, and 223,128 rupees to *Dwarka Doss*; and these sums, together with interest, were afterwards stated as 925,056 rupees. The British Resident at *Oudh* then pledged himself that all the creditors of the Nawab should be paid. In 1796 all the European creditors mentioned in the list were paid, and the claims of many of the native creditors were compounded, but the agent on behalf of *Dwarka Doss* refused to accept a compromise, and this claim remained unadjusted. In 1797 the Nawab *Asophoo Dowlah* died, and after a temporary occupation of the throne by *Mirza Allee*, who was deposed, *Saardut Allee*, a brother of the deceased Nawab, was placed on the throne by the Governor-General of *India*. At the time of *Asophoo's* death the subsidy payable by him to the British Government was £500,000 per annum, and this was afterwards increased by arrangement to £760,000 per annum, and he was to pay the just debts of the late Nawab within three years from that date. All the claims were settled by the Nawab except those of the said bankers. In 1801

the *East India Company* were continually pressing upon the Nawab for the delivery over to the English of at any rate some portion of his territories, and in one of the despatches the Governor-General stated to the Nawab as an argument in favour of his giving up all his provinces to the Company, "Your Excellency would be exonerated from a heavy but just burthen, the debts of your predecessor;" and the Governor-General engaged, on the part of the Company, to discharge these debts.

On the 10th of November, 1801, Lord *Wellesley* entered into a treaty with *Saardut Allee*, by which he obtained, in lieu of subsidy to the British Government, the cession of a portion of his territory producing an annual revenue exceeding £1,352,000, thereby decreasing the means of the *Oudh* Government to pay creditors, and taking away territory the revenues of which were, as to some of the above securities, specially pledged to *Dwarka Doss*.

In 1809 the claimants, *Dwarka Doss* and *Monohur Doss*, appointed a Mr. *Prendergast* as their agent, for the purpose of pressing their claims upon the notice of the Directors of the *East India Company*. Various applications and proceedings were subsequently taken by Mr. *Prendergast*, by petitions and memorials, up to the year 1814, when he made an application to the Governor-General, the Earl of *Moira*, and on that occasion he applied to the Marquis *Wellesley*, who wrote a letter to the Earl of *Moira* containing the following passages respecting the claims of the bankers:—

"The details of the case are fully stated in the memorial and in other documents, which will, of course, be submitted to your Excellency's judgment. It will therefore be sufficient for me to assure you that, after full consideration of the whole matter, my decided opinion was that the memorialists were entitled, in justice and equity, to the full amount of their claims, and that it was the duty of the Supreme Government to urge the demand on the Nawab of *Oudh* with all the force which the delicacy of such question might admit." And after further observations he concluded thus: "I repeat to your Excellency my entire conviction of the strength of this claim, and the propriety of urging it upon the consideration of the Nawab Vizier, who, I trust, will be induced to discharge so clear a debt of honour, especially as it stands

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absolutely distinct from any other demand of any other creditor of the State of *Oudh*."

On the 1st of January, 1816, the Earl of *Moira*, having taken the claims of the bankers into consideration, wrote a minute upon the subject, in which he distinctly recognised the justice of the claims put forward, and considered them entitled to all the assistance which the Government could afford them.

In October, 1816, the Resident at *Lucknow* wrote to the Nawab on the subject of these claims, stating that the justice of them was entirely admitted by the British Government. In November, 1816, the Government of *Bengal* sent a despatch to the Court of Directors of the *East India Company*, bringing under their notice the claims of the bankers which had been repudiated by the Nawab, and urging the Directors to interfere and use their influence in obtaining a settlement. To this despatch the Directors answered that they must decline any interference in the matter, and they directed the Government of *Bengal* to rest satisfied with what had been done, and to abstain from any further proceedings in relation to the claims. In January, 1829, Mr. *Prendergast* presented a memorial to the Board of Control, who declined to interfere on behalf of the claimants. In December, 1831, he presented another memorial to the Board, and in April, 1832, the President of the *India* Board requested the *East India Company* to prepare a despatch directing the Governor-General in Council to write to the King of *Oudh* on the subject, and to instruct the Resident to verbally explain to his Majesty "the grounds on which the British Government felt themselves constrained to press upon his serious attention a claim which ought to have been discharged thirty years ago, and which the agents of the parties have not ceased to prosecute to the utmost of their power, both in *India* and this country." This despatch the Directors of the *East India Company* refused to prepare. A full despatch was then written, which the Government directed the *East India Company* to forward through the Governor-General to the King of *Oudh;* but the Directors distinctly refused to send such despatch. In consequence of this refusal, a rule *nisi* was applied for in the Court of Queen's Bench by the Attorney-General, calling upon the Court of Directors to shew cause why a mandamus should not issue to compel them to

send to the Governor-General the despatch in question; but no further application was made to the Court upon the subject.

On the 7th of February, 1856, the Kingdom of *Oudh* was annexed to the British possessions of *India* under the Government of the *East India Company*. On the 17th of March, 1857, the Court of Directors, in obedience to an order of the House of Commons, made a return shewing the names of all creditors of the State of *Oudh*, in which was included the claim of the Plaintiffs for 1,158,700 rupees with interest, and on the 12th of May, 1857, the President of the Board of Control announced to the House of Commons that all public and *bonâ fide* claims against the State of *Oudh* would be paid and satisfied out of the revenues of the country.

On the 17th of June, 1857, the *East India Company* wrote to the Governor-General directing him, with as little delay as possible, to cause all *bonâ fide* claims against the late Native Government of *Oudh* to be investigated and reported upon either by the Financial Commissioners of *Oudh* or by some officers specially appointed for that purpose, acting under the orders of the Chief Commissioners, and on the 5th of July, 1858, Lord *Stanley*, the then Secretary of the Board of Control, stated in the House of Commons "that the transfer of the revenues of the Kingdom of *Oudh* to *Great Britain* did carry with it a liability for such debts of the former government as were fairly and justly contracted."

On the 2nd of August, 1858, the Act for the better government of *India* was passed, and on the 1st of November, 1858, the government of the territories of *India* was assumed by proclamation by the Queen. During the year 1860 a further memorial was presented to the Secretary of State for *India* by Mr. *Prendergast* in support of the Plaintiffs' claims, in which all the various admissions of the justice of these claims by the successive Governors-General and Ministers of State were set out; and in pursuance of further directions from the Home Government, a commission was appointed in *India* for inquiring into and reporting upon the claims preferred against the late Native Government of *Oudh*, when the particulars of the Plaintiffs' claims were handed in to the commission.

On the 5th of April, 1867, the said Commissioners made their

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report, the effect of which was that it had been sufficiently proved before them that the sum of 569,127 rupees was due from the Nawab Vizier to the house of *Dwarka Doss Moteechund* for principal money lent; that there was nothing to lead to the inference that any part of this money was paid by the Nawab Vizier between April, 1796, and his death in 1797; and there was nothing to shew that any money had ever been received by the creditors on account of the debt. As to the sum of 345,999 rupees, entered under the name of *Munsaram*, the agent of *Dwarka Doss*, there appeared no reason to doubt that the same was borrowed for the service of the State, and that the debt was contracted in the administration of public affairs. The amount of 223,128 rupees, entered under the name of *Dwarka Doss Moteechund*, appeared to have been appropriated for the use of the Dooab, which meant animals, quadrupeds, cattle, or beasts, and they could not say that the bond on the face of it shewed that the money was lent for the purpose of the State. It also appeared from the said report that the Commissioners expressed their opinion that the claims on behalf of *Dwarka Doss Moteechund* had been repudiated by the Native Government of *Oudh*.

The Plaintiffs by their bill submitted that the Commissioners came to a wrong conclusion as to the repudiation by the Native Government of *Oudh;* and further, that the Commissioners were without jurisdiction to investigate that subject, or to adopt, on behalf of Her Majesty's Government, an act of repudiation committed by a former sovereign, which when first suggested had been emphatically reprobated by the Governor-General of *India;* that inasmuch as all their claims stood on the same footing as their claim for 345,999 rupees expressly found due to them, and inasmuch as their claims were by the finding of the Commissioners declared to be (provided the same were not extinguished by any valid repudiation) real and unpaid claims against the State of *Oudh*, the Plaintiffs ought to be declared entitled to payment of all their said claims with interest.

The bill further stated that the amount of net revenue derived by Her Majesty from the territories of the Kingdom of *Oudh* was £1,375,329 per annum.

The bill prayed a declaration that the documents above men-

tioned created a charge on the revenues derived from the territories forming the Kingdom of *Oudh*, and that the Secretary of State for *India* in Council might be declared liable to pay, and might be ordered to pay, to the Plaintiffs, out of the property and effects vested in Her Majesty for the purposes of the Government of *India* under the Act 21 & 22 Vict. c. 106, the amount due on the said documents, with such interest as this Court, on a due consideration of all the circumstances of the case, might deem equitable and just. That an account might be taken of what was due and owing to the Plaintiffs, and the Defendants might be ordered to pay the Plaintiffs the costs of the suit.

The case came on upon demurrer to the bill.

Mr. *Fitzjames Stephen*, Q.C., and Mr. *Macnaghten* (the *Attorney-General* (Sir *R. Baggallay*) with them), for the demurrer:—

The demurrer to this bill raises four principal questions, namely, want of equity, want of jurisdiction, that the claim is barred by the *Statute of Limitations*, and that the question is *res adjudicata*.

From the statements in the bill, it appears that the right of these claimants was acknowledged to be just and equitable by the *East India Company*, by several Governors-General of *India*, and by the Home Government, and the claims were frequently pressed upon the Nawab, but he never did pay them, and never acknowledged them to be due, and it was fifty-six years ago that the *East India Company* refused any longer to press the claims against the King of *Oudh*. The fact was that the claims were repudiated by a sovereign State, and there was no process by which the debt could be enforced against the State. All that can be said for it is that it was a moral obligation not enforceable by law, and certainly not by an English Court of Equity.

The case made by the bill is that this claim was a charge upon the revenues of *Oudh*. The principle upon which the bill proceeds is that the King of *Oudh* was not liable to pay anything, but that the debt was treated as a debt of honour. It is now admitted that but for the combined effect of the Act of Annexation and the Act of 21 & 22 Vict c. 106, by which the Queen assumed the government of *India*, the Plaintiffs would have no claim; that is to say, that before the annexation they would have no claim, but after

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annexation they might sue the English Government. Therefore, at the time the money was lent, in 1794, there was no liability, but on the annexation the liability arose. The *East India Company* filled two positions; on the one hand, it was a great trading corporation, having liabilities of vast importance. Then they had accorded to them a *de facto* dominion over large tracts of country. *Oudh* was one of the provinces of the empire of *Delhi*, but in 1819 the King of *Oudh* was recognised as an independent sovereign, and continued so until February, 1856, when his territories were annexed to the British dominion. The legal position of the British Government and the *East India Company* is shewn by many Acts of Parliament. The preamble to the Act 21 & 22 Vict. c. 106, states that the territories under the government of the *East India Company* were held in trust for Her Majesty until Parliament should provide otherwise. And there are many other Acts shewing the position of the Government. In fact, therefore, the Company were trustees for Her Majesty. Powers were delegated to the Company for periods of twenty years at a time till the Act of 1858. The acts which were done by the Company in the capacity of trustees for the English Government, must be held to be as much acts of State as if done by the Government of *India*. This was laid down in *Buron* v. *Denman* (1). There the defendant, Captain *Denman*, was ordered to proceed with an armed force to obtain the liberation of two British subjects who were detained as slaves at the *Galinas* by the king of that country. He was to use force for this purpose, and in doing so he destroyed some of the property of the plaintiff, who sued the defendant for damages; and it was held that the ratification of the defendant's act by the Ministers of State was equivalent to a prior command, and rendered it an act of State for which the Crown was alone responsible. So in this case the acts of the *East India Company*, in exercising public and political power, were acts which were afterwards recognised by our Government, and they became acts of State for which the Crown alone was responsible, and they cannot be called in question by any Court of justice. Their only remedy, if they have any, is by petition of right to the Queen.

(1) 2 Ex. 167.

The case of *Secretary of State in Council for India* v. *Kamachee Boye Sahaba* (1) is another authority upon this point, where it was held that an act done by an agent of the Government, being ratified and adopted by the Government, was equivalent to previous authority, and that transactions of independent states between each other are governed by other laws than those which municipal Courts administer, such Courts having neither the means of decreeing what is right, nor the power of enforcing any decision which they may make.

That case was followed by *Sirdar Bhagwan Singh* v. *Secretary of State for India* (2), where an estate being seized by the Crown by its right of conquest and not by virtue of any legal title, such seizure was regarded as an act of State, and not liable to be questioned by a municipal Court.

The *Nabob of the Carnatic* v. *East India Company* (3) was a bill filed by the Nabob of the *Carnatic* against the *East India Company* for discovery and account of rents and profits of his territories while in their possession as security for debt, and for the balance, submitting to pay it if against him. A plea that the transaction took place between the plaintiff and the defendants in respect of their sovereign powers was overruled; but on an appeal reported (4), the bill was dismissed on the ground that political treaties between a sovereign State and subjects of the Crown of Great Britain, acting as an independent State under powers granted by charter and Act of Parliament, are not a subject of municipal jurisdiction.

The question was also decided in *Duke of Brunswick* v. *King of Hanover* (5). There it was held that the King of *Hanover*, who was also a British subject, and was in *England* at the time, exercising his rights as such subject, could not be made to account in the Court of Chancery for acts of State done by him in *Hanover* and elsewhere abroad, in virtue of his authority as a sovereign, and not as a British subject. In that case, in the House of Lords, Lord *Campbell* (6) expressed himself thus: "I have the most sincere deference for the Court of Chancery acting within its jurisdiction.

(1) 7 Moo. Ind. Ap. 476.
(2) Law Rep. 2 Ind. Ap. 38.
(3) 1 Ves. 371.
(4) 2 Ves. 56.
(5) 6 Beav. 1.
(6) 2 H. L. C. 27.

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I believe there never was a tribunal established in any country which is more entitled to respect; but still there are limits to its jurisdiction. It cannot do everything. The Lord Chancellor, I presume, would not grant an injunction against the French Republic marching an army across the *Rhine* or the *Alps*. The Court of Chancery must be kept within its jurisdiction, and then I am sure it confers the highest benefits upon the community."

After the Kingdom of *Oudh* was annexed, the King could have had no right to file a bill in this Court against Lord *Dalhousie*, the then Governor-General, calling on him to account and to surrender up the territory of *Oudh*. Whatever was done in annexing *Oudh*, it would be wrong to say that the Company had any liability for that act. The annexation of *Oudh* was an act of war, and the effect was that the Nawab should be deposed, and his government should be that of our government.

The King of *Oudh* gave way to the power of *England*, and the revenues came to be administered by this country. The liabilities of *Oudh* became liabilities which could be enforced only by the will of the annexing power.

It is true that the ruling powers of *India* from time to time were of opinion that the liabilities of *Oudh* ought to be paid, but there was no obligation on our part to do so, beyond what was a mere moral obligation, and there is no power in any Court to compel payment. There is, therefore, a complete want of equity in this bill.

We contend that the *East India Company* could not have been sued, because what they did was in exercise of the sovereign power of the Queen. We say there could have been no claim against the Company before the annexation, and the right they now put forward only commenced in 1856. Then they had all that time from 1856, when they might have sued the Company, or might have taken the proper course of presenting a petition to the Crown.

Then as to want of local jurisdiction, we will first consider for what purpose the Government is placed in the position of the Company. The Act of 21 & 22 Vict. c. 106, by which the government of *India* was transferred to Her Majesty, enacted by the 39th, 40th, and 41st sections, that all real and personal property

of the *East India Company* should vest in Her Majesty for the purposes of the government of *India;* and powers of sale and purchase, and right to enter into contracts, were vested in the Secretary of State in Council, the expenditure of the revenues of *India* being subject to the control of the Secretary of State in Council.

Then the 65th section enacts that the Secretary of State in Council may be sued as well in *India* as in *England*, and all persons shall have the same remedies and proceedings, legal and equitable, against the Secretary of State in Council of *India*, as they would have had against the Company ; and the property and effects thereby vested in Her Majesty for the purposes of the government of *India* should be subject and liable to the same judgments and executions as they would while vested in the Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the Company; and by the 71st section the Company were not to be liable in respect of any claim, demand, or liability which should have arisen or might thereafter arise out of any treaty, contract, grant, engagement, or fiduciary obligation incurred or entered into by the Company before the passing of the Act.

By a subsequent Act, 22 & 23 Vict. c. 41, the previous Act was amended for the purpose of removing doubts which had arisen as to the 40th section of the other Act, and it was then provided that the Local Government of *India* should have the same power to enter into and execute contracts and assurances in *India*, on behalf of the Secretary of State in Council, as before the commencement of the Act they were competent to enter into and execute, on behalf of the *East India Company.*

These Acts therefore shew that the Secretary of State may be sued in *India*, and the proper mode of suing is by a petition of right, as in *Thomas* v. *The Queen* (1), where it was decided that a petition of right would lie for a breach of contract resulting in unliquidated damages. We submit that the only liabilities for which the Secretary of State can be sued are contracts entered into by the Company as a trading company, but they never could be liable for what they did in their public capacity.

(1) Law Rep. 10 Q. B. 31.

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Assuming, however, that any such liability exists, then we say that under any circumstances there can be no jurisdiction in any Court in this country over a matter which took place in *India*. The parties are foreigners, and the subject claimed is foreign, and the proper Court for deciding such a question is the High Court of *Calcutta*, from which there is an appeal to the Privy Council in this country. If such a claim were to be entertained by the Courts in *England*, it would be impossible to see a limit to the applications of a similar nature by all the Indian creditors who might think fit to set up a claim against the Government.

This point has been decided in many cases. In *Matthaei* v. *Galitzin* (1) it was held that you could not sue a foreigner in this country in respect of property situate abroad, and there was a similar decision in *Blake* v. *Blake* (2), where the plaintiff was a foreigner, the defendant an Irishman, and the contract entered into in *France* respecting property in *Ireland*, which for this purpose was a foreign country, there being Courts in *Ireland* in which the case might have been tried.

In the case of *Re Holmes* (3), which was a petition of right, a demurrer was allowed on the ground that the Queen was as much resident in *Canada* as in this country, and that the suit ought therefore to have been brought in *Canada*.

The objection upon the *Statute of Limitations* is apparent from the statements in the bill. The debt was incurred in 1794 and 1795, and repeated applications for payment are alleged to have been made down to 1832; but from that period till the annexation of 1856, a period of twenty-four years, no steps whatever were taken. In 1860 a memorial was presented, but again no further steps were taken till the filing of this bill in June, 1874. It was in pursuance of the memorial of 1860 that the commission was appointed to inquire into and report upon the claims justly due by the Kingdom of *Oudh*, and a judicial proceeding then took place. The Commissioners stated that the claims had been repudiated by the King of *Oudh*. The case has therefore been tried by a competent authority, and we say that it is *res adjudicata*.

There is another objection to this bill, which is, that the Plain-

(1) Law Rep. 18 Eq. 340.
(2) 18 W. R. 944.
(3) 2 J. & H. 527.

tiffs do not shew a title according to English law. There is no allegation in the bill that the Plaintiffs are the legal personal representatives of *Dwarka Doss*. The only statement in the bill is that the moneys so advanced belonged solely to *Dwarka Doss*, who died leaving three daughters only, all now dead; and the Plaintiff *Joynarain Doss* is the only son of the eldest daughter. The Plaintiff *Jaggonauth Doss* is the only son of the second daughter, and the Plaintiff *Seetulpersaud* is the grandson, and the Plaintiff *Bany Sahoi* is the son of the third daughter; therefore these four Plaintiffs are, according to Hindoo law, the sole heirs and next of kin of *Dwarka Doss*, and are solely interested in recovering the debts so incurred.

It was decided in *Humphreys* v. *Humphreys* (1), in a bill for an account of personal estate, that though the person who has a right to administer to the testator be a party, yet this is not sufficient without administration actually taken out. And in *Fernandes Executors' Case* (2) it was decided that money could not be remitted to the executors of a man whose will was proved in *India*, but could only be paid to them on their producing an English probate. The Plaintiffs must, therefore, conform to English law before they can be entitled to receive any money claimed by them in this suit.

Another difficulty of a serious nature arising upon this bill is the question how the object of the Plaintiffs is to be carried out. The bill prays that the documents set out may be declared a charge on the revenues of the Kingdom of *Oudh*. Such a decree could never be worked. There would have to be an inquiry as to what are the revenues of that kingdom, and there must be a receiver appointed, which would be the usual course, but the receiver would be powerless, and the decree would be a nullity.

Mr. *Glasse*, Q.C., Mr. *Benjamin*, Q.C., Mr. *J. D. Bell*, Mr. *Bathurst*, and Mr. *Byrne*, in support of the bill:—

It has been contended that our remedy, if any, is by petition of right to the Queen; but this argument is disposed of by the case of *Frith* v. *The Queen* (3). In that case a petition of right was presented by the representative of a person who claimed a sum of

(1) 3 P. Wms. 349. (2) Law Rep. 5 Ch. 314.
(3) Law Rep. 7 Ex. 365.

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money alleged to have become due from the Sovereign of *Oudh* before that province was annexed in 1856 to the territories of the *East India Company*, and it was held that the Secretary of State in Council for India and not the Crown was, by the provisions of the *Act for the better Government of India*, 1858, the person against whom the suppliant must seek redress. The correctness of that decision is shewn by a reference to the 65th, 67th, and 68th sections of the Act 21 & 22 Vict. c. 106. The *East India Company* took possession of *Oudh* as a sovereign power, and at the same time, according to the law of nations, became liable to pay the public debts and liabilities of the annexed province. Consequently the debt we now claim was transferred in 1856 to the *East India Company*, but it was a debt incapable of being enforced either against the King of *Oudh* or the Company by means of the ordinary tribunals. Then, in 1858 the Crown succeeded the Company, and became the transferee of this debt, which can now be enforced against the Secretary of State for *India*, who by that Act is made the person to be sued.

It has been also urged that there may be a difficulty in carrying out the decree asked for by the bill, but that is not a consideration which, at the present stage, should have any weight. If we are entitled to a decree upon the law of the case, this demurrer must be overruled.

The case of *Buron* v. *Denman* (1) is not of importance here, because we maintain that this was not an act of State. It is not an act between two sovereign powers. It is a debt acknowledged to be charged upon the land taken possession of. In one of the bonds the debt is charged upon the actual revenues of the year, the others are upon the general revenues of the State of *Oudh*. The case has, therefore, nothing to do with the rights as between sovereign powers. We sue under the Act of Parliament. The territories of *Oudh*, which were before vested in the Company, were lands and hereditaments that became vested in the Crown under the Act of 1858. By the 67th section, all treaties made by the Company are declared binding on Her Majesty, and all contracts, covenants, liabilities, and engagements of the Company, made, incurred, or entered into before the commencement of that

(1) 2 Ex. 167.

Act, were to be enforced by and against the Secretary of State in Council. Therefore, if we make out that this was a liability existing in the Company before 1858, then the case is plain as far as our equity against the Secretary of State for *India* is concerned.

In *Walsh* v. *Secretary of State in Council for India* (1) it was held that the statute 21 & 22 Vict. c. 106, substituted the Secretary of State for *India* for the *East India Company*, that it transferred to the Queen all trust property held by the Company subject to the trusts affecting it, and released the Company from the trust. This case was heard on appeal (2), and was reversed, upon the ground that the covenant in the particular deed under which the claim was made was a private covenant between Lord *Clive* and the Company, and that such a covenant could only be affected by a direct engagement, but it did not affect the general principle laid down by the Court below.

Then it has been said that the locality of the jurisdiction is bad; but we have constantly had suits upon the subject of property in the colonies which have been entertained in this Court. In *Tulloch* v. *Hartley* (3) it was held that a Court of Equity in *England* would entertain a bill to settle the boundaries of real estate in *Jamaica*. In *Brown* v. *Harris* (4) a bill by the officers of the army and the *East India Company*, claiming an account of prize-money, was not allowed to stand, on the ground only that a trust was not created in the Crown; and in *Re Holmes* (5) the same objection prevailed, that the land of a colony was vested in the Queen by a colonial Act for the public purpose of the colony, and consequently the *Petitions of Right Act*, 1860, did not give jurisdiction to the Court of Chancery to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the Court. But here there is an express trust created by Act of Parliament, and the revenues of *India* are vested in Her Majesty for the purpose of the government of *India*, and by that Act the Secretary of State for *India* may be sued in respect of all claims which could have been enforced against the *East India Company*.

(1) 30 Beav. 312.
(2) 10 H. L. C. 367.
(3) 1 Y. & C. Ch. 114.
(4) 13 Ves. 552.
(5) 2 J. & H. 527.

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With regard to the rights of the claimants, it will be seen from the statements in the bill that the justice of the claim was recognised by several successive Governors-General of *India* and by the Home Government on several occasions, that it was pressed upon the King of *Oudh*, and that payment of the money was promised from day to day and from time to time, so as to make it impossible for the Plaintiffs to institute any suit for the recovery of the debt, and it was stated in Parliament by Lord *Stanley* that the annexation would carry with it all the debts due by the Company at the time of annexation. We say, therefore, that the territory of *Oudh* upon which the claimants' debt was charged having been taken by the Company under the cession of 1856, that cession has, of right and necessity, carried with it the liability to all creditors, whether the Company took with or without notice of the claims; that in fact the Company had the fullest notice given them of the existence of these claims; that it had recognised the justice of them, and their officers had acknowledged them; and that it was stated by the Government that, on the annexation, the natural result would follow, namely, that the annexation would carry with it a liability to such debts of the former Government as were fairly and justly contracted.

Then as to the length of time this debt has been standing, we can shew the Court that we have commenced our suit as early as it was possible for us to do so. No one can say that we have slept upon our rights, for the applications for many years were numerous and unceasing until we found it was impossible to obtain redress. After that came the annexation of the territory of *Oudh* to the Government of the *East India Company*, when we again presented a memorial, and the consequence was that a commission was appointed to inquire into all the claims made upon the Company. That commission was not invested with judicial functions. It was only authorized to inquire into the debts. By their report, however, they stated that a portion of the debt had been repudiated by the King of *Oudh*. It was not part of their duty to determine this question, and they had no power to adopt such a conclusion on behalf of the Government. But in doing so they formed an opinion at variance with all the ruling powers, who from time to time had admitted the justice of the claims. It

cannot be said that the report of these Commissioners made the case *res judicata*.

After this, in 1858, the Government of *India* was transferred to the Crown, and the statement by the Ministry in the House on the passing of that bill, that all just debts would be satisfied, was sufficient to prevent our taking any immediate steps, feeling perfectly satisfied that at length our claims were in a fair way to be liquidated. The door was not open to us till 1856, and the *Statute of Limitations* would not begin till the period at which there is some one against whom proceedings can be taken. In *Douglas* v. *Forrest* (1), where the testator resided and died abroad, it was held that his executor in *England* might be sued within six years after taking out probate.

No one can accuse us of laches or negligence. It is true, as Mr. Justice *Storey* says in his Equity Jurisprudence (2), that if a party has been guilty of gross laches, or if he applies for relief after a long lapse of time unexplained by equitable circumstances, then a bill for relief will be dismissed, for Courts of Equity do not administer relief to the gross negligence of suitors; but this doctrine is to be taken with some qualifications. Here the circumstances are fully explained, and there is neither gross laches nor negligence to be attributed to the Plaintiffs.

The truth is that the ground for objecting to our claim is that it was said to have been repudiated by the King of *Oudh* himself; and therefore the Government have continued the repudiation, so that repudiation runs with the government just the same as a covenant runs with the land. The Commissioners found out that, though the debt had been justly contracted, they might repudiate it because it had been repudiated by the Nawab; but, in fact, it never was repudiated by the Nawab in the sense of a denial of its being due. It was admitted to be due, but payment was refused.

It is said that this is not the proper tribunal; but by the Act of 1858 it is provided that you may sue the Secretary of State in *India* or in *England*. To sue him in *India* is an additional right given beyond the right to sue him in *England*. If it had not been for that permissive right to sue in *India*, we could only have sued in *England*. They try to force us to sue in *India* for this reason,

(1) 4 Bing. 686. (2) Sect. 64 a.

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that the *Statute of Limitations* in *India* is shorter than the period allowed in this country, and there we should be put out of Court.

[The Vice-Chancellor:—The principal difficulty is whether this is not an act of State, and therefore that you cannot sue. No doubt the *East India Company* in its trading capacity might have been sued, but the company had two rights—that of a trading company and of a political power.]

In modern times a power annexing another country takes all the advantages with all the debts of the annexed country. It is quite clear that it could not confiscate a public debt. The principle is laid down in *Phillimore's* International Law (1). "The opinion of *Vattel* upon this subject is thus emphatically expressed: '*L'État ne touche pas même aux sommes qu'il doit aux ennemis; partout les fonds confiés au public sont exempts de confiscation et de saisie en cas de guerre.*' This is an opinion which now may happily be said to have no gainsayers." This was a public debt of *Oudh*, and became by the annexation the public debt of *England*.

Then it is laid down thus in *Wheaton's* Elements of International Law (2): "Debts contracted in the name of the State by its authorized agents, for its public use, the nation continues liable for, notwithstanding the change in its internal constitution. The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations of the former government. It becomes entitled to the public domains and other property of the State, and is bound to pay its debts previously contracted." The obligations incurred by the *United States* towards the creditors of *Texas*, by its annexation and admission in 1845 as a member of the Union, is then given as an example. There the debts of *Texas* were paid by the Government of the *United States*. It is not an act of State for one country annexing another to promise to pay the debts of the annexed State. It is a contract on the annexation which the country is bound to fulfil. This was virtually admitted to be the law in the case of *Frith* v. *The Queen* (3), where Chief Baron *Kelly* said: "It is objected that no liability capable of being judicially enforced was incurred by the *East India Company*, and therefore that

(1) Vol. iii. p. 148, s. 89. (2) Lawrence's Edition of 1863, p. 52.
(3) Law Rep. 7 Ex. 365, 367.

none was transferred by the Act of 1858 to the Secretary of State. But I cannot assent to this argument. If the law be—as for the present purpose I assume it is—that by annexation the debt and liabilities of *Oudh* passed to the *East India Company*, it cannot be but that some right of action against the Company existed; and that right of action must now be enforced, not however by petition of right, but against the Secretary of State." And Mr. Baron *Martin* expressed the same view, and said: "The debt in respect of which this petition is presented was one which I will assume passed in the year 1856 to the *East India Company*, and I think an action could have been maintained against that company in this country, and probably in *India* also. I have no doubt that in some way or other they could have been made liable."

We have therefore taken the only means left to us to establish a debt which is just and equitable, and ought to be satisfied out of the revenue of the territories upon which it was charged.

Sir R. Malins, V.C.:—

My view is so clear on this point that I do not call for a reply.

The case is a very remarkable one, and you would hardly suppose that at this time of day such a case would have come before a Court. But it is a case by no means devoid of merits; and it is not because the debt has been owing eighty years merely that I feel myself obliged to come to the conclusion to allow this demurrer.

The transaction brought before the Court by this bill is, that about the year 1794, eighty-one years ago, the then Nawab, or Sovereign of *Oudh*, borrowed of certain bankers sums of money of large amount for the purpose of enabling him to fulfil his obligations to the *East India Company*, to whom he was indebted, and to whom he had to make various payments. In that sense, therefore, the money was borrowed for a purpose, and in a manner which brought it into the hands of the then Governors of *India*, the *East India Company*. Bonds were given, the form of which is set out in the bill, and it was agreed that the sum should be paid out of the revenues of the territory of the *Sircar*, which is *Oudh*, with interest. No other objection has been made to the debt than that it carried interest, sometimes at 24 per cent. per annum, some-

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times $2\frac{1}{2}$ per cent. per month, or 30 per cent. per annum, and sometimes 3 per cent. per month, or 36 per cent. per annum. However, this debt was regarded by the *East India Company*, and I may say, so far as the statements in this bill go, by every succeeding Governor-General of *India*, with favour, and as one which ought to be paid; and so strong was this feeling that the Marquis of *Wellesley*, after he had ceased to be Governor-General of *India*, and when writing in 1814 to his successor, the Marquis of *Hastings*, then Earl *Moira*, expressed this opinion: "The details of the case are fully stated in the memorial and in other documents, which will of course be submitted to your Excellency's judgment. It will, therefore, be sufficient for me to assure you that after full consideration of the whole matter my decided opinion was that the memorialists were entitled, in justice and equity, to the full amount of their claims, and that it was the duty of the supreme Government to urge the demand on the the Nawab of *Oudh* with all the force which the delicacy of such a question might admit." That view was acquiesced in, I may say, by every person representing the *East India Company* at that time, and it was partaken by the Home Government of *India*, as appears from a despatch drawn up by the Board of Control in 1814. We all know what the position of the *East India Company* was. The Company were the Governors of *India;* they were trustees, as the Act of Parliament of 1858 states, for Her Majesty, but still the Company were the governing body of *India;* and we know in practice that all despatches of an important character the *East India Company* were obliged to submit to the Board of Control, that is, the Home Government of *India*. They exercised a control over it, and unless approved by the Board of Control, I believe I am right in saying the despatch was not allowed to go. Then, on the other hand, there were certain despatches which came from the Board of Control which the Government of *India* would not forward, and in 1814, a despatch having been drawn up by the Board of Control, they desired that the Chairman and Directors of the *East India Company* should forward that despatch to *India*, in order that the obligation to pay these debts, of which these bonds represent some, should be enforced on the then King of *Oudh;* for *Oudh* had become a kingdom in 1819, and remained so

until the annexation by the British Government in 1856. That despatch the Chairman and Board of Directors of the *East India Company* refused to forward to *India*. It is stated in the bill: "On the 15th of January, 1834, at a meeting of the Court of Directors, they refused to comply with the orders of the Board until compelled by law. The following is a copy of their resolutions:—The chairman"—that is, the Chairman of the *East India Company*—"adverting to the *Bengal* political draft relative to the claims of the *Lucknow* bankers on the King of *Oudh*, which the Board of Commissioners for the Affairs of *India* have required the Court to despatch, stated that since he came to the chair he had repeated verbal communications upon that subject with the President of the Board"—that is, the Board of Control—"with a hope that the Board might be induced either to withdraw the draft or greatly to modify its contents, and that now, finding the Board's decision was unalterable, it became his duty, without further delay, to call the Court's attention to the order which they had received requiring them to forward the despatch. Whereupon the chairman moving the Court, it was resolved, *nemine contradicente*, That, being deeply impressed with a conviction that the interference which the Board requires that the company should exercise with the King of *Oudh* on behalf of the *Lucknow* bankers is unjust in principle, inconsistent with the relation subsisting between His Majesty and the Company, and would be most mischievous in its effects, the Court cannot consent, even ministerially, to act upon the orders of the Board unless compelled by law to do so." This dispute between the Board of Control at home and the *East India Company* sitting in *Leadenhall Street* went to a great extent, because, the *East India Company* having resolved that they would not forward this despatch unless compelled by law to do so, on the 31st of January, 1834, the Attorney-General applied to the Court of King's Bench and obtained a rule *nisi*, calling upon the Court of Directors to shew cause why a writ of mandamus should not issue to compel the Court of Directors to send to the Governor-General the despatch in question. That rule was obtained upon an affidavit of the Assistant-Secretary to the Indian Board, setting out the above correspondence on the subject of sending the despatch. Then it is stated, "that the various minutes of the members of the Court of

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Directors, together with the application for the said mandamus, are contained in the returns made to the House of Commons on the 8th and 15th days of May, 1834;" and it is further stated that the proceedings on the mandamus were dropped. The result was that the despatch was never sent. Nothing can be more strong, therefore, than the opinion of the Home Government at that time, that this was a debt which ought to be paid, and that it was their intention, as far as they could, to compel the *East India Company* to take such steps as they thought proper to enforce its payment; but it was not insisted on. That was in 1834. From 1834 to 1856, as far as appears from this bill, and as far as I can, therefore, know anything about it, there was a complete lull, and no steps whatever were taken to enforce this debt for a period of twenty-two years; that is, for a period of above sixty years from the time when the debt was incurred, it having been incurred in 1794.

Then came a very important event historically, which I am bound to notice judicially—the annexation of *Oudh* to the territories of *India*, then governed by the *East India Company*, on the 7th of February, 1856. Now, what was the state of things at the date of that annexation? It is admitted by the Plaintiffs that their position at that time was that they had a debt which was not enforceable, for which they had no legal remedy, which in a Court of conscience and justice ought to have been paid, but for which they were absolutely without remedy. Now, the annexation, as I said, took place on the 7th of February, 1856. It has been argued, and I entirely agree in that argument, that every State which takes possession of the territories of another, whether it be by force, as in the case of the annexation of *Lucknow*, or whether by treaty, as in the case which has been brought forward of the annexation of *Texas* to the *United States of America*—takes the annexed territories liable to the debts and loans which exist on its revenues. I am, therefore, on the view I take of this case, not at all inclined to dispute the fact that the *East India Company*, when they took the territories of the King of *Oudh*, took such debts as existed against him. But what was the debt that existed against him? The debt was not enforceable. If it was not enforceable against him, what was there to make it enforceable against the *East India Company?* I am not able to say that there was any-

thing that threw upon them a legal obligation which did not exist against the sovereign power from whom they wrested or took these territories. It seems to me, therefore, to use an expression of this Court, that the debt was transferred to the *East India Company* in the plight and condition in which the creditor held it as against the Sovereign whose territories were transferred, or rather seized, by force, as in this case. If, therefore, the debt was not enforceable against the King of *Oudh*, my opinion is that it was not enforceable in any Court of Law or Equity against the seizing power, the *East India Company*. We know as a matter of history, after the annexation of *Oudh*, the exasperation and angry feeling produced in *India* by that annexation. It must now be presumed that it was an act of wisdom; it was an act of the Government of this country; it was an act, therefore, which I am bound to regard as a wise and proper act; but it is matter of history that great discontent and great troubles, and some persons think even the subsequent mutiny of the people was, if not produced, greatly accelerated and exaggerated by the annexation. However that may be, the mutiny which took place in the year 1857 no doubt conduced to the determination of the British Government that instead of the territories of *India* thereafter being governed in the name of the *East India Company*, as they did in fact belong to Her Majesty, they should be governed by Her Majesty; accordingly the *East India Act* of 1858 was passed.

Before that bill had received the Royal assent, when it either had passed or was on the eve of passing through each branch of the Legislature, on the 17th of June, 1857—(the bill having received the Royal assent on the 2nd of August following)—the *East India Company* wrote to the Governor-General of *India*, directing him (to use the words of the despatch), "with as little delay as possible to cause all *bonâ fide* claims against the late Native Government of *Oudh* to be investigated and reported upon either by the Financial Commissioners of *Oudh* or by some officers specially appointed for that purpose, acting under the orders of the Chief Commissioner." Then what the Plaintiffs very much rely upon is this, that on the 5th of July, 1858, Lord *Stanley*, then the President of the Board of Control, made a statement in the House of Commons which was as follows: "The transfer of the

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revenues of the Kingdom of *Oudh* to *Great Britain* did carry with it a liability for such debts of the former government as were fairly and justly contracted."

Nothing, however, which was said by Lord *Stanley* in the House of Commons, where he spoke only as a member of the Legislature, could convert that which was an irrecoverable into a recoverable debt; therefore the debt remained, in my opinion, after the annexation, just as it was before, a debt which was irrecoverable and could not be enforced, but on which they might make an appeal to the sense of justice of the Government, and ask them whether they would or would not accede to this demand. On that ground my opinion is, that although all the obligations were transferred by the Act of 1858 to the Secretary of State for *India* in Council, it was only in this way, that where it was a legal obligation, it became a legal obligation upon the Secretary of State; where it was a moral obligation only, it was no more than a moral obligation on him. Therefore that, I think, is the first ground which is fatal to the bill.

But there is another, which appears to me a most important and also an equally fatal, objection. The annexation of *Oudh* was an act of sovereignty, which is an act of State. It does not, in my opinion, create any civil right whatever. Several very important cases were cited upon this point. The first was *Buron* v. *Denman* (1), in which Captain *Denman*, then in command of Her Majesty's ships on the coast of *Africa*, was directed by the Governor of *Sierra Leone* to proceed to a certain point and rescue two Englishmen who had been made prisoners, and, if necessary, to employ force. He did proceed there; he did employ force; and in employing force he destroyed considerable property belonging to the Plaintiff *Buron*, who was a trader in slaves in *Africa*. The Court of Exchequer, on a trial at Bar, decided that by the law of nations, the Plaintiff being a Spaniard, and the slave trade not being illegal in that country, he had a property in slaves, and was therefore entitled to be paid; that is to say, he could maintain an action for the value of slaves which had been destroyed. But what they decided was this, as fatal to the action, that what Captain *Denman* had done was in pursuance of an order of the

(1) 2 Ex. 167.

Government; that whether the act was directed by the Government before it was committed, or whether it was adopted by the Government afterwards, the subsequent adoption was equal to an original command; therefore what he did was not his act, but the act of the Sovereign that he represented. It therefore was a case in which no action could be maintained against him, because his act was not his individual act, but the act of the State, and for that no action could be maintained. The case of *Nabob of the Carnatic* v. *East India Company* (1) has been relied upon, but I need not do more than refer to it. The case is reported upon a plea. There the decision is that the suit could be maintained; but when the case came on for hearing before the Lords Commissioners (2) a different conclusion was arrived at; because, upon the answer coming in and the suit coming on for hearing before the Lord Commissioner *Eyre*, different facts came out. The marginal note is this: "Political treaties between a foreign state and subjects of the Crown of *Great Britain*, acting as an independent state under powers granted by charter and Act of Parliament, are not a subject of municipal jurisdiction; therefore a bill founded on such treaties by the Nabob of *Arcot* against the *East India Company* was dismissed." Lord Commissioner *Eyre*, giving the opinion of the Lords Commissioners, says (3): "We are all satisfied that the bill must be dismissed. It is a case of mutual treaty between persons acting in that instance as states independent of each other; and the circumstance that the *East India Company* are mere subjects with relation to this country has nothing to do with that. That treaty was entered into with them, not as subjects, but as a neighbouring independent state, and is the same as if it was a treaty between two sovereigns; and, consequently, is not a subject of private municipal jurisdiction. The Court considers the case totally independent of the judgment the Lord Chancellor pronounced: for the case upon which the Court proceeds is introduced by the answer, which has added a great number of particulars to the case by introducing the other treaty, which explains the first, and shews it was not mercantile in its nature, but political; and therefore this decision stands wholly clear of the judgment upon the plea."

(1) 1 Ves. 371. (2) 2 Ves. 56.
(3) 2 Ves. 60.

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The same law is distinctly decided in the case of *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1). The marginal note of the case, which I believe is quite accurate, is this: "Transactions of independent sovereign states between each other are governed by other laws than those which municipal Courts administer. Such Courts have neither the means of decreeing what is right, nor the power of enforcing any decision which they may make." The facts are these: "The Rajah of *Tanjore*, a native independent sovereign, but in virtue of treaties under the protection of the *East India Company*, died without leaving issue male, when the *East India Company*, in the exercise of their sovereign power, and in trust for the British Government, seized the Raj of *Tanjore*, and the whole of the property of the deceased rajah as an *escheat*, on the ground that the dignity of the rajah was extinct for the want of a male heir, and that the property of the late rajah lapsed to the British Government." It was there held, that as the seizure was made by the British Government, acting as a sovereign power, through its delegate, the *East India Company*, it was an act of State, to inquire into the propriety of which a municipal Court had no jurisdiction." The final conclusion of the Privy Council (the judgment being given by Lord *Kingsdown*) was this (2): "The result, in their Lordships' opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a sovereign power, through its delegate, the *East India Company*; and that the act so done, with its consequences, is an act of State, over which the Supreme Court of *Madras* has no jurisdiction. Of the propriety or justice of that act neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say, that even if a wrong has been done, it is a wrong for which no municipal Court of Justice can afford a remedy. They must advise Her Majesty to reverse the decree complained of, and to dismiss the Plaintiff's bill; but they recommend that no costs should be given."

(1) 13 Moo. P. C. 22. (2) 13 Moo. P. C. 86.

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Therefore that again is a distinct judgment that the seizure of the property in that case was an act of sovereign power; and I am totally at a loss to see on what ground I can come to any other conclusion than that the annexation of the territories of *Oudh* in 1856 was a sovereign act of the Government of *India*, that is, the *East India Company*, on the part of Her Majesty, and as trustees for her. On those grounds, therefore, I am of opinion that this being an act of State, it is not liable to any review by a Court of Equity or a Court of Law, and that the bill is not sustainable.

I had an opportunity last night of looking at all the cases that were cited, and I think those are the only authorities of any importance on that branch of the case, but they are clear and distinct, and, in my opinion, proceed on the broadest principles.

Those, therefore, are two fatal objections; but it does appear to me that there is another, namely, that this is not the proper tribunal in which the suit should be brought. I think the principles acted upon by the Vice-Chancellor *Wood* in *Re Holmes* (1), which was not cited before me when I decided the cases of *Blake* v. *Blake* (2) and *Matthaei* v. *Galitzin* (3), but is quite in accordance with those two of my own, are applicable here—that where there is a complete tribunal capable of deciding the question where the property is and where the parties are, that is the tribunal to be resorted to. Now, what is the property here? The object is to enforce a liability upon the revenues of *Oudh;* that is, in *India.* There are Courts of Law and Equity for every part of *India.* If this is a case for the Court of Equity, then there is a Court of Equity there. There the Plaintiffs are, for they reside at *Benares;* and the thing that is to be recovered is in *India;* and from the Courts there, there would be an appeal to the Supreme Court of Appeal in this country, namely, the Privy Council. I agree with the observation of Mr. *Macnaghten* that the Secretary of State for *India* is also there, because they can just as well sue him in that country as in this. There is no single advantage to be derived from suing him in this Court; he is present there, and he is present here, and therefore the subject-matter in dispute being in *India*, the Plaintiffs resident in *India*, and the Secretary of State being in

(1) 2 J. & H. 527. (2) 18 W. R. 944.
(3) Law Rep. 18 Eq. 340.

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India, all circumstances seem to me to concur in saying that if this is a case to be sustained at all, it is in the Indian Courts, and not in the Courts of this country, that the suit should be brought. The case of *Re Holmes* (1) was a petition of right with regard to some lands in *Canada*. It was a demurrer of the Attorney-General to a petition of right of *Holmes* and others, and the marginal note is as follows:—"Where land in a colony is vested in the Queen by a Colonial Act for the public purposes of the colony, the *Petitions of Right Act*, 1860, does not give jurisdiction to the Court of Chancery to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the Court. By a Canal Act of the Provincial Legislature of *Canada*, land taken for a canal was vested in the Queen. By a second Provincial Act the land so taken was vested in the officers of Her Majesty's Ordnance, and it was enacted that so much of the land taken as had not been used for the canal should be restored to the owners. By a third Provincial Act the lands were re-vested in the Queen for the purposes of the colony, and subject to future colonial legislation. To a petition of right by suppliants claiming the restoration of certain lands taken for the canal from their predecessors in title, but not used, a demurrer was allowed on the ground that the Courts of this country had no jurisdiction." That appears to me entirely applicable to the present case, and it follows that in the Courts of *India* this claim, if claim it be, must be enforced. The same sort of question came before me in *Blake* v. *Blake* (2), which was a suit for the recovery of lands in *Ireland*, where the parties were not resident in *England*, and the land was not in *England*. On that ground I allowed a plea which put the suit out of Court. In *Matthaei* v. *Galitzin* (3), before me, I decided, where a bill was filed in this Court to obtain a receiver in regard to property in *Russia*, where the Plaintiff and Defendant were both foreigners, that the mere accident of the Defendant being temporarily resident in this country gave no jurisdiction to this Court, and I allowed a demurrer which put that suit out of Court. Therefore, having the concurrence of Vice-Chancellor *Wood* in this view, I have considerable confidence that this is not a case in which a suit can be maintained in this country at all.

(1) 2 J. & H. 527. (2) 18 W. R. 944.
(3) Law Rep. 18 Eq. 340.

Then, if I look at the objects of this suit, I think the prayer of the bill sufficiently shews that it is not a bill which should be filed in this Court. What does the bill pray? "That it may be declared that the documents above mentioned created a charge on the revenues derived from the territories forming the Kingdom of *Oudh*, and that the Secretary of State for *India* in Council may be declared to be liable to pay, and may be ordered to pay, to the Plaintiffs, out of the property and effects vested in Her Majesty for the purposes of the Government of *India* under the Act 21 & 22 Vict. c. 106, intituled "An Act for the better Government of *India*," the amount due on the said documents, with such interest as this Honourable Court, on a due consideration of the circumstances of the case, may deem equitable and just." The Court, therefore, is asked to declare that these debts are a charge on the revenue of *Oudh;* but there is no such thing. The revenues of *Oudh* now form part of the general revenues of *India*. I am asked to sever the revenues of *Oudh*, which are stated to be £1,375,329 per annum, from the rest of the revenues of *India*, and declare that it is a charge upon them. If this Court declares that there is a charge on property, it necessarily follows that the property must be realized for the purpose of paying the charge. If the Government did not pay the charge it would be followed by the appointment of a receiver of the money—a thing so utterly absurd that I think it is conclusive against the possibility of this suit being sustained.

Then, lastly, there is the objection that although there may be a sort of moral obligation, to which I have already adverted (and which, possibly, if I indulged in my own wishes, I may still hope that the Government of *India* may attend to, when appealed to as matter of compassion or as matter of good feeling), yet this is not a Court of conscience, this is a Court which can only enforce legal or equitable rights. Whatever my opinion may be as to the propriety of this debt being paid or not paid, I have only to decide whether it is a debt the payment of which can be enforced. There is, however, this additional objection to the intervention of this Court, that it is a very stale claim. It has now been in existence for eighty-one years; great changes have taken place, and probably it would be very difficult, if I knew all the facts, ever to

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carry the debt, if it was recovered, to the parties properly entitled to receive it. But when there is an appeal to this Court to recover a debt of eighty-one years' standing, although there may be no Statute of Limitations which strictly and properly puts it out of Court, yet I think, considering that in 1856, after the annexation of *Oudh* took place, it was a right which had then been in force for sixty years, and that no steps had been taken, up to the filing of this bill in 1874, to enforce its payment, and that there was, even according to the shewing of the Plaintiffs, a lying-by from 1856 to 1874, a period of eighteen years, in addition to more than sixty years which had passed before, it is in every sense of the word a very stale demand; and that is, in my own opinion, another reason why this Court should not interfere in any way to assist its recovery. The parties must, therefore, be left to the merciful consideration of the Government of *India*, as far as my judgment goes, and this demurrer must be allowed.

Mr. *Glasse*:—I ask for liberty to amend specially. I wish to prove as a fact that we are the legal personal representatives of the original debtors. An objection in that respect was raised in the argument for the demurrer, and in case this decision of your Honour should be appealed from, we do not wish to go to the Court of Appeal with this blot upon the bill which we can remove, as considerable expense might be incurred to no purpose.

The VICE-CHANCELLOR:—I did not go into that question, because I attach very little importance to it. You have failed upon four points, and I do not think the bill can be improved by amendment. I think, upon the whole, I shall best exercise my discretion by refusing any liberty to amend.

Mr. *Macnaghten*:—Perhaps the difficulty might be removed by taking the bill as amended now in that particular clause, and stating that the Plaintiffs are the legal personal representatives.

Mr. *Glasse* acceded to this proposal.

The VICE-CHANCELLOR:—Then you may treat the bill as if it had been amended by alleging that the Plaintiffs are the legal

personal representatives of the creditor. Let that be distinctly understood. Then the demurrer will be allowed, and the Plaintiffs must pay the costs of the demurrer, unless the Defendant will consent to waive the costs.

Mr. *Stephen*:—I am not in a position to consent.

The VICE-CHANCELLOR:—Then the costs must be paid by the Plaintiffs.

Solicitor for the Plaintiffs: Mr. *John Rae.*
Solicitors for the Defendant: Messrs. *Lawford & Waterhouse.*

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[1875 R. 3.]

Separation Deed—Return to Cohabitation—Wife's Equity to a Settlement.

The Plaintiff was entitled at the time of her marriage to a sum of money secured by the promissory note of her brother. A deed of separation between the Plaintiff and her husband was executed, in which the Plaintiff's brother covenanted that he would hold the money upon trust for the wife and husband successively for life and then for the child of the marriage. The husband and wife, after separation, returned to cohabitation, and the husband became bankrupt:—

Held, upon demurrer to a bill by the wife and child to have the money held upon the trusts of the separation deed, or to be declared entitled to an equity for a settlement, that as the deed contained provisions beyond the purview of a mere separation deed it could be supported as a valid settlement, and that the brother having by the deed made himself a trustee of the legal debt, it became subject to the wife's equity to a settlement. Demurrer overruled.

THE Plaintiff *Clementina Ruffles*, the wife of *Alfred Ruffles*, was entitled, at the time of her marriage, to a fifth part of the residue of certain property bequeathed to her by the will of her father, *William Bullock*, who died in October, 1843. After the testator's decease his executrix and executors carried on the farm, which formed portion of his property, up to or about the year 1850, when they let the same to *Alfred Bullock*, a son of the testator, and they

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wound up the testator's estate, and each of his five children's share amounted to the sum of £728. It was then arranged that *Alfred Bullock* should retain the share of *Clementina Ruffles* on the security of his promissory note, and should pay her interest thereon at the rate of 5 per cent. per annum. This interest was thereafter paid to her. She married *Alfred J. Ruffles* in January, 1865, and there was issue one child of the marriage, namely, the infant Plaintiff, *Henry J. Ruffles*, who was born in July, 1866.

On the 5th of November, 1867, a deed of separation between *A. J. Ruffles* and his wife was executed, by which *A. J. Ruffles* covenanted and agreed with *Alfred Bullock*, as trustee, that his wife should be at liberty to live apart from him; that *A. Ruffles* would, during the joint lives of himself and his wife, pay to *A. Bullock* the sum of £63 12*s.* for the maintenance of their child *H. Ruffles;* and that it should be lawful for *A. Bullock*, during the lives of *A. Ruffles* and his wife, to pay to his wife the interest of the said sum of £728 secured as aforesaid, and that all real and personal estate to which *Clementina Ruffles* then was, or which she or *A. Ruffles* in her right should at any time during their joint lives become seised, possessed or entitled, should be held and enjoyed by *Clementina Ruffles* during her life for her sole use; and in the event of her surviving *A. Ruffles* the same might be sold, given away, devised, bequeathed or disposed of by *Clementina Ruffles;* and that if *A. Ruffles* should survive his wife, then that all such real and personal estate should be held upon trust for *A. Ruffles* for life, and after his decease upon trust for *Henry J. Ruffles*, his heirs, executors, administrators, and assigns absolutely. And *Alfred Bullock* covenanted with *A. Ruffles* that he would stand possessed of the said sum of £728 and the interest thereof upon trust during the joint lives of *A. Ruffles* and his wife to pay the interest thereof to *Clementina Ruffles* and her assigns during her life, and after the decease of *Alfred Ruffles* in the lifetime of his wife, upon trust for the wife absolutely; but in case of the death of *Clementina Ruffles* in the lifetime of *A. Ruffles*, then upon trust to pay the interest of the said £728 to *A. Ruffles* and his assigns during his life, and after the decease of the survivor of them, the said *A. Ruffles* and his wife, then upon trust to pay the principal money and interest to *Henry J. Ruffles* absolutely. And the said *Clementina Ruffles*, with

the intention of binding her separate estate, covenanted with *A. Ruffles* that she would not take any proceedings for compelling *A. Ruffles* to allow her any support or maintenance, or to cohabit with her.

Alfred Ruffles and his wife continued to live separate and apart until the year 1871, when they resumed cohabitation, and had ever since continued to live together; but *A. Bullock* had retained the said sum of £728 in his hands and paid the interest thereon to *Clementina Ruffles* on her sole receipt until his death, which occurred in April, 1873. *A. Bullock* made his will in March, 1873, and thereby appointed the Defendants *Thomas Alston* and *Robert Garrard* his executors, and they admitted assets sufficient to pay the £728.

A. Ruffles was in partnership with *Thomas Andrew*, and the firm having become insolvent a petition was filed for liquidation of their property, and the Defendant *W. P. Goulding* was appointed trustee of their estate.

The Defendant *W. P. Goulding* claimed to have the said sum of £728 paid to him, as such trustee, alleging that it formed part of the estate of the Defendant *A. Ruffles;* but *Clementina Ruffles* submitted that, under the circumstances, she was entitled to have the same held upon the trusts of the indenture of the 5th of November, 1867, or settled for the benefit of herself and issue.

The bill prayed that the trusts of the indenture of November, 1867, so far as it related to the sum of £728, might be carried into execution, or that the Plaintiff *Clementina Ruffles* might be declared entitled in equity to have a settlement made upon her and her issue of the said sum.

The questions were now argued upon demurrer to the bill.

Mr. *Glasse*, Q.C., and Mr. *F. Thompson*, in support of the demurrer:—

The first question which arises on this demurrer is, whether where a deed of separation has been executed between husband and wife, and a subsequent cohabitation, that puts an end to the deed? And the second question is, whether if that is so, a married woman is entitled to claim an equity to a settlement out of a legal chose in action?

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We say, in the first place, that a resumption of cohabitation sets aside the deed and destroys the interest of the child as well as of all parties who would take under it. All the authorities agree in this, that the deed is at an end for all purposes by a return to cohabitation. This was admitted in *Webster* v. *Webster* (1), so also in *Bateman* v. *Ross* (2) the general doctrine was laid down as settled, that reconciliation after separation entirely does away with the effects of it, and Lord *Redesdale's* decree in that case was affirmed. In *Bindley* v. *Mulloney* (3) the deed contained a covenant by the husband with the trustees to settle a sum of money upon trust for his wife for her life, and for their children after her death; no separation in that case ever took place, the deed was held to be void, and Lord *Romilly* said that the recital of the agreement by the husband and wife to live separate upon the terms and conditions thereinafter contained governed the whole deed; and the proviso, the covenants of the trustees, and indeed every part of the deed pointed to the separation as the consideration upon which it was based. The consideration had failed, and consequently the deed never took effect.

This point in the case is also completely covered by the decision in *Westmeath* v. *Salisbury* (4), where a settlement on a wife and children upon an agreement for an immediate separation was held to be void on the ground that the parties had continued to live together after the execution of the settlement.

Then, upon the second point, in case this deed is void, as we contend it is, the wife claims an equity to a settlement. The only property in question here is the £728 which originally formed part of the money left to the wife by her father. It was lent to the wife's brother upon a promissory note, and interest was paid by him to the wife. This constituted a *chose in action*, which was not reduced into possession by the husband, and out of such property the wife cannot be entitled to an equity for a settlement. This doctrine only applies to an equitable debt recoverable in equity. If the debt can be recovered without coming into equity for it, then this Court has no power or right to enforce an equity to a

(1) 1 Sm. & Giff. 489; 4 D. M. & G. 437. 17 Jur. 915

(2) 1 Dow. 235.

(3) Law Rep. 7 Eq. 343.

(4) 5 Bli. N. S. 339.

settlement. The principle laid down in the case of *Burdon* v. *Dean* (1) was, that the wife could only have a settlement out of all her property which could be obtained through the Court of Equity. This question was also discussed in *Wortham* v. *Pemberton* (2), and the inference to be drawn from it is that a wife will not be entitled to an equity for a settlement out of what is not a purely equitable interest. And in *Bosvil* v. *Brander* (3), where a lady being a mortgagee, married a man who became bankrupt, it was decreed that the assignees of the bankrupt, and not the wife, were entitled to the mortgage. The subject is also discussed in *Bright's* Husband and Wife (4), where two cases are cited, *Winch* v. *Page* (5), and *Ellis* v. *Ellis* (6), in which doubts were expressed as to the doctrine being universally applicable; but the author adds, "with these exceptions, the authorities are uniformly against the extension of this right to property not within the jurisdiction of equity."

We contend, therefore, that the separation deed is completely put aside by re-cohabitation, and that the property now in question is still a legal debt which vests in the husband as it did before the separation deed. It is the same as if the deed had never been executed. The husband might before the deed have brought an action to recover the money, and this Court cannot interfere to control the husband's right.

Mr. *Miller*, Q.C., and Mr. *W. W. Cooper*, who appeared for the Plaintiffs, were not called upon.

SIR R. MALINS, V.C.:—

The facts of this case are very simple, and the question is whether the demurrer should be allowed.

Mrs. *Clementina Ruffles*, the married lady, and her child, are the Plaintiffs; the lady is the wife of *Alfred J. Ruffles*, and was, under the will of her father, *William Bullock*, who died many years ago, entitled to a share of his estate. For some reason, which does not appear upon the face of the bill, the money to which she was enti-

(1) 2 Ves. 607.
(2) 1 De G. & Sm. 644.
(3) 1 P. Wms. 458.
(4) Vol. i. p. 231. Ed. 1849.
(5) Bunb. 86.
(6) 1 Vin. Ab. Sup. 475.

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tled, instead of being paid to the lady, was retained by her brother on her behalf. Whether he retained it as trustee for her is rather doubtful, but I am very much inclined to think that the effect of the transaction was, that he held the money as trustee for his sister, since it does not appear it was for his own accommodation, or that he desired to have the money. The bill states this: "From the time of the testator's decease the executrix and executors of the said testator carried on the farm up to or about the year 1850, when they let the same to *Alfred Bullock*, a son of the testator; and they wound up the testator's estate, and each of his five children's share amounted to the sum of £728, and it was then arranged that *Alfred Bullock* should have and retain the share of *Clementina Bullock*, now the Plaintiff *Clementina Ruffles*, on the security of his promissory note, and should pay her interest thereon at the rate of £5 per cent. per annum. There is some little doubt, but I will take it, as Mr. *Glasse* argued in support of the demurrer, that it was a legal debt. I will also assume, for the purpose of the present decision, that where there is a legal debt, and nothing but a legal debt, the wife cannot have an equity for a settlement, and cannot sustain a claim for a settlement out of the legal debt, in this Court. In that state of things, the lady having married in 1865, when her brother must have had the money in his hands for many years, she and her husband separated in November, 1867, and upon that separation a deed, which was, in one sense, no doubt, a deed of separation, was executed, and by that deed the husband gives the usual licence to the wife to live apart from him; and as a part of the arrangement, amongst other things, it was agreed between the husband and wife that the yearly interest of the said sum of £728, amounting to the sum of £36 8*s.*, should during the lifetime of the said *Clementina Ruffles* be paid to her for her own separate use. And it was also agreed between the said husband and wife, that in the event of the decease of the said *Clementina Ruffles* in the lifetime of the husband the yearly interest of the said sum of £728 should be paid to the said *Alfred John Ruffles* during his life, and that after his decease the principal and interest moneys thereof should be held by the said *Alfred Bullock* in trust for the said *Henry John Ruffles* absolutely," that is, their only child.

Now certainly it is beyond the purview of a deed of separation to provide for the husband in the event of his surviving the wife, and it is also beyond the purview of a deed of separation to provide for the child of the marriage out of the wife's property. If this agreement was intended to be, as it is *primâ facie*, nothing more than a separation deed, I quite agree there is plenty of authority for this proposition, to settle which no authority need have been cited to me, that a mere separation deed is put an end to by the husband and wife resuming cohabitation. But I think it is a very doubtful point whether this deed does not go beyond a separation deed in making provision for the husband himself and for the only child of the marriage; they were, at that time, not expecting to have any other child, inasmuch as the arrangement was that they should live for the rest of their lives apart. Then it is agreed, that if this is money which can be recovered in this Court, the equity of a settlement can attach. Now I cannot help thinking that this deed, in another respect, goes considerably beyond a separation deed when the debtor, that is the brother, *Alfred Bullock*, joins in the deed, and turns himself from a legal debtor into a trustee, because he is a party to the deed, having executed it; and amongst other things there is this covenant: "The said *Alfred Bullock* doth hereby for himself, his heirs, executors, and administrators, covenant with the said *Alfred John Ruffles*, his heirs, executors, and administrators, that (*inter alia*) he the said *Alfred Bullock* shall and will stand possessed of, and interested in, the said sum of £728, and the interest thereof," upon these trusts. It appears, therefore, that, for the benefit of the husband and wife and child, the debtor upon this promissory note was to be turned into a trustee, which gave many remedies against him which a Court of Law could not have, and also made the trusts last longer than six years, or even than twenty years; all that is so greatly for the benefit of all parties, that though, as between husband and wife, the deed has come to an end, I think, as regards *Bullock*, he having joined in the deed, and declared himself to be a trustee of this money, I cannot regard it as having been brought to an end in that respect by the agreement to resume cohabitation. The result of this case is perfectly clear. If this is a valid deed over and above separation, then it stands thus: The

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husband and wife are both alive, the child is still alive; the wife has the first life estate, the husband has the second life estate, and then the *corpus* goes to the child; and in that case the assignees of the bankrupt, as the settlement stands, must have the life estate of the husband in remainder on the death of the wife. But if the settlement does not stand, then I should require it to be more solemnly argued than this case has been before I could come to the conclusion that, under no possible circumstances, could a wife avail herself of the machinery of this Court to obtain a settlement out of money secured to her, before her marriage, by a promissory note, a bill of exchange, or a bond.

If a wife were to file a bill making the debtor and her husband parties, which in that way would become a sort of interpleader-suit, she setting up that her husband had deserted her, left her unprovided for, and a burthen on the parish or on her friends—the husband having a legal right to recover that debt—I cannot think that this Court is so powerless that she could not, in such a case as that, enforce a settlement.

It is not necessary for me to decide that question here; but I am of opinion—first, taking the whole deed of 1857 together, that it does go beyond a mere separation deed. Then I think it has also the effect of turning that legal debt of the brother into a trust enforceable in this Court.

Therefore, on both those grounds, I am of opinion that the demurrer must be overruled, because the basis of this bill is to carry the trusts into execution. If there be a settlement, the demurrer must be overruled; and if there is no settlement, then the bill is filed in the alternative, and prays the equity of a settlement. If I am right in my conclusion, under all the circumstances, that it is not a mere legal debt, then she would have the power to ask the Court to make a settlement upon her of so much of the property as the Court should think fit; and on both grounds it seems to me that the demurrer must be overruled.

Solicitors for the Plaintiffs: Messrs. *Walter, Moojen, & Son.*
Solicitors for the Defendants: Messrs. *Simpson & Cullingford.*

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V.-C. M.
1875
March 22.

County Court Appeal—Lease—Parol Agreement—Specific Performance—Outlay upon Property.

A., a tenant in possession, filed a bill against *B.* for the specific performance of a parol agreement for a lease of thirty years. *A.* had contracted to sub-let, and his sub-lessee had expended money in alterations and repairs with the knowledge and approval of *B.*:—

Held (reversing the decision of the County Court Judge), that the outlay by the sub-lessee was as much a part performance of the agreement as if made by *A.*, who was therefore entitled to specific performance.

The Court will not, upon appeal from a County Court, entertain an objection which is not raised in the case settled by the County Court Judge.

THIS was an appeal against the decision of *Thomas Falconer*, Esq., the Judge of the County Court of *Glamorganshire*, holden at *Pontypridd*.

The suit was for the specific performance of an alleged verbal contract entered into in the year 1871, by which the Defendant agreed to grant a lease to the Plaintiff of the *Red Lion Inn*, at *Pontypridd*, in the county of *Glamorgan*, for the term of thirty years, from the 15th of August, 1871, at a yearly rent of £39, subject to the usual covenants, and it was agreed between them that if the Defendant could obtain the consent of the *Taff Vale Railway Company* to a change in the line of frontage of the said premises, the Plaintiff was to pull down the frontage within two years from the grant of such lease, and erect and build a new and entire front wall, windows, and door to the premises, and the Defendant promised to apply for such consent to the railway company, who were the owners of the adjoining ground; but if such consent could not be had, no alteration in the line of the frontage was to be made. Instructions were given by the Defendant to Mr. *Robert Thomas* to draw a lease upon the terms of this agreement, and the draft of such lease was prepared accordingly, and was submitted to and approved by the Defendant and by the Plaintiff, but no lease had yet been executed.

Soon after the above arrangement, the Plaintiff agreed, with

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the sanction of the Defendant, to grant a sub-lease of the premises for the remainder of the term to *William Leyshon*, who was to make certain alterations therein, and fit up the premises as a manufactory of aërated waters, and to erect the necessary buildings for that purpose; and upon the faith of such agreement *W. Leyshon* immediately commenced to make the alterations, and actually completed the same with the full consent and approbation of the Defendant, who came continually to the premises to inspect the same during the progress of the works.

The Defendant applied to the railway company for their consent to change the site of the frontage of the premises, but the consent of the company was refused.

The Plaintiff, in order that he might be able to execute a formal lease to *W. Leyshon*, had applied to the Defendant to execute a lease upon the terms of the draft lease so approved of; but the Defendant had refused to do so, and had threatened to take proceedings to eject the Plaintiff from the premises. The Plaintiff prayed specific performance of the agreement, and an injunction to restrain such ejectment.

The case settled by the Judge of the County Court stated that the Plaintiff's evidence was to this effect—that he had been lessee of the *Red Lion Inn* from the 15th of May, 1860, for ten years, at a rent of £39 a year; that Mrs. *Evans*, the wife of the Defendant, was the owner of the property, and she had negotiated with the Plaintiff the terms of a new lease. Mrs. *Evans* was to get the consent of the railway company to the alteration of the front of the house. The alteration was to be made provided there was consent. The Plaintiff afterwards arranged to let the premises to Mr. *Leyshon* at a higher rent. They were both to find some of the money, and *Leyshon* was to pay a rent on the money laid out by the Plaintiff. Mrs. *Evans* gave instructions for the lease. The Plaintiff had not himself spent money upon the premises since the new lease.

The evidence of Mrs. *Evans* was that a lease was promised to the Plaintiff on condition that the railway company would allow the house to be drawn out to the front; but if they would not consent, then the Plaintiff was not to have a new lease. She had told the Plaintiff and *Leyshon* that they had broken the insurance,

and she sent for the agent and paid the extra premium. The draft of the lease had never been sent to her.

Mr. *Thomas*, the solicitor who prepared the lease, said he believed the instructions came from Mrs. *Evans*. He had been given an old lease by which to prepare the new one, with a proviso, if consent obtained to alterations, such alterations to be made by the Plaintiff; but if no consent, there would be no alteration. The draft lease was not sent to Mrs. *Evans*, but witness saw her about it several times.

William Leyshon, in his evidence, said he had seen Mr. and Mrs. *Evans*, and told them of the arrangement he had made with the Plaintiff. He told them they were going to build and have a factory for ginger beer. The Defendant objected to a boiler, and said the house was insured; witness said he would pay the extra premium. He went to the insurance office and found that Mrs. *Evans* had paid the extra premium. Witness had put in a boiler, and he had built a stable in the yard and laid on the water from the water company. He had also put gas there and doors extra, and two panel windows. He had converted a lumber-room into a parlour, papered it, and put up a fire-grate. Mr. *Evans* came there at different times. He told Mr. *Evans* that it was understood he was to have a lease for thirty years. His outlay had been from £20 to £25, and in the inside from £10 to £15. He had always been willing to make the alteration to the frontage; but the railway company would not consent to it. The proposed new front would have cost £300. Mr. *Evans* was glad to have the stable erected; he was backwards and forwards there every day.

Bolton Cull, a builder, stated that the alterations made by the Plaintiff might have cost from £12 to £15. The stable was a wooden structure, and was moveable, and could be taken away. He had put in three doors and two windows. The gas and water fittings could be taken away.

The case then stated that it was contended for the defence: first, that there was no security that the £300 would be laid out; secondly, that two years had already expired; thirdly, that the money laid out was not in pursuance or by force of the agreement, nor with the privity of the Defendant, and that there had been no expenditure on the front of the house.

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For the Plaintiff it had been contended that the agreement for the lease was that the lease should be granted if the consent of the railway company to the alteration was not obtained, and that the alterations made by the sub-tenant *Leyshon* were sufficient part performance of the contract to entitle the Plaintiff to a lease.

The County Court Judge held that as the Plaintiff himself had made no expenditure on the premises there was no part performance of the agreement by him, and that what was done by the sub-tenant was only what a tenant from year to year might have done.

If the Vice-Chancellor should be of opinion there was such an outlay as to entitle the Plaintiff to specific performance, there must be a decree for the Plaintiff, otherwise the order for the dismissal of the plaint was to stand.

Mr. *Everitt*, for the Appellant:—

The only question submitted by the case settled by the County Court Judge upon this appeal, is whether the outlay made by Mr. *Leyshon*, to whom the Plaintiff had agreed to demise the house and premises for the term agreed upon by the Defendant, is sufficient to entitle the Plaintiff to say that he has made an outlay on the premises on the faith of the promise to grant him a lease thereof. It is clear, upon the evidence adduced in the County Court, that the lease was to be granted absolutely for thirty years, at £39 a year rent, by the Defendant to the Plaintiff, but there was also a conditional arrangement that the Plaintiff should entirely alter the front of the house, provided the consent of the railway company could be obtained. The decision of the County Court Judge goes upon the assumption that the lease was in any event to be granted, and that it was not conditional on the consent of the company; therefore the only question submitted to this Court is whether the outlay by the sub-lessee was on the faith of the lease to the Plaintiff. It is submitted that this outlay must be considered the same as if it had been made by the Plaintiff himself. The County Court Judge seems to have considered that an outlay on premises agreed to be leased by a parol contract must be an outlay in doing work agreed under the contract to be done by the intended lessee, and that any outlay by a person to

whom premises are by a parol contract agreed to be let for a term, does not entitle the lessee to specific performance unless the outlay is in respect of erections specifically contracted to be erected. And therefore, that as neither the Plaintiff nor his sub-lessee have laid out money in erections agreed to be erected as part of the contract, they are not entitled to specific performance. The fallacy of this view is obvious. The outlay was effected by the under-lessee, but it is precisely the same as if made by the lessee himself; for the underlease was granted upon the faith of the parol agreement, and upon the faith of that agreement the outlay was made.

Mr. *Freeling*, for the Respondent:—

The principal objection to the Plaintiff's right to a decree in this case is that the suit is instituted against Mr. *Evans*, the husband of the person who was the owner of the property, the subject of the alleged parol agreement. If the property belonged to Mrs. *Evans*, her husband had no power to grant a lease for more than twenty-one years; consequently an agreement by him for a lease of thirty years is absolutely void. A husband cannot bind his wife's real estate for thirty years. The whole evidence in the case goes to shew that the contract was made with Mrs. *Evans*, if there was such a contract, but the wife is not a party to this suit.

It is the estate of the husband and wife, in right of the wife, and the Court is asked, where the wife has entered into an agreement for a lease for thirty years, to enforce it against the husband. This is an alleged contract by the wife, relating to her own real estate. There is no evidence to shew that the husband so conducted himself as to make his wife an agent for him.

[The VICE-CHANCELLOR:—I must assume that the husband was bound by the acts of his wife. I do not think that I can go out of the case sent up to me on appeal. I think no point can be taken on the appeal which is not contained in the case, settled as it is with the consent of both the parties. If the objection had been taken as a defence below, there might have been evidence given on the subject. It might have been proved that the husband considered his wife acting as his agent. As there is no evidence

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of want of authority, I shall assume that there was evidence to shew that the husband constituted his wife his agent. Probably the objection was not taken because it could no doubt have been proved that Mrs. *Evans* was in effect acting with the sanction of her husband.

Mr. *Bristowe*, Q.C., as *amicus curiæ*, referred to *Midland Banking Company* v. *Chambers* (1).]

Then as to the merits. It was held by the County Court Judge, that as the Plaintiff himself had made no outlay upon the premises, there had been no part performance of the parol agreement, notwithstanding that there had been an expenditure by the sub-tenant. The Plaintiff was in possession under a former lease for ten years, and upon the faith of the alleged parol agreement he entered into an agreement with another person to grant an underlease, but he made no expenditure upon the faith of the agreement. It was the under-tenant who expended the money upon the faith of the agreement with the Plaintiff. The outlay was not made in pursuance of the agreement, because the outlay provided for by the agreement was the erecting a new front to the house. That would have cost £300, according to the evidence, which would have been a substantial consideration for the lease; but all the sub-tenant did was to expend between £20 and £30 in fitting up the premises for his own particular trade of an aërated water manufacturer, and even that outlay was made by doing slight alterations and adding fixtures which might be removed by a tenant from year to year.

It is in evidence that the stable was a wooden erection, and might have been removed. The boiler, the gas and water pipes might, of course, have been taken away; so that the whole outlay was for removable tenant's fixtures. It cannot, therefore, be said that the money was expended on the faith of this parol agreement. The act to be done to constitute part performance of a parol agreement must be an unequivocal act resulting from the agreement. That was shewn in the case of *Frame* v. *Dawson* (2). But where the act is equivocal and easily admits of compensation, as by a tenant rebuilding a party wall, then there is no part per-

(1) Law Rep. 4 Ch. 398. (2) 14 Ves. 386.

formance. The acts done in this case are equivocal acts, and not referrable to the agreement, and cannot entitle the Plaintiff to a decree for specific performance. In the case of *O'Reilly* v. *Thompson* (1), where there was an agreement by parol that on the Plaintiffs procuring a release of right from a stranger the Defendant would convey, and the Plaintiff procured the release by paying a valuable consideration, that was held not to be part performance, and the *Statute of Frauds* (29 Car. 2, c. 3) could be pleaded to a bill for specific performance of such an agreement. The Lord Chief Baron there said: "I do not incline to extend the cases of part performance; they have raised the very mischief which the statute intended to prevent."

SIR R. MALINS, V.C.:—

This case is stated from the County Court with great inaccuracy, and it is very difficult to discover what I have to decide. I think, however, from the admissions of the parties, some of the difficulty is removed. The Plaintiff had been the lessee of the *Red Lion Inn* for ten years up to May, 1870; he was still in possession of the property, holding over, I suppose, on the terms of the old lease, but, at all events, he was in possession, and being so, it was verbally agreed by the Defendant that he would grant the Plaintiff a new lease for thirty years at a rent of £39 per annum. The Plaintiff having that agreement for a lease, entered into an agreement with *Leyshon* that he should have a lease for the whole of the term at an increased rent. Now it is plain that, whatever was done by the Plaintiff was done on the faith of the parol agreement with the Defendant that he should have this lease granted to him. The Plaintiff certainly would never have entered into an agreement for an underlease for thirty years unless he had fully believed that he had himself a valid agreement for a lease. There could be no specific performance of the agreement by reason of the Plaintiff having entered into possession, because, in fact, he was in possession. The rule is, that if *A.* agrees to grant a lease to *B.*, and *B.* enters into possession upon the faith of that agreement, then *B.* is entitled to a decree for specific performance, and the case is thereby taken out of the *Statute of*

(1) 2 Cox, 271, 273.

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Frauds. But this Plaintiff was in possession, and my opinion is, that where the tenant is in possession and afterwards does anything which alters his position for the purpose of carrying out the new contract, that equally takes the case out of the *Statute of Frauds.* This is the law settled by the case of *Nunn* v. *Fabian* (1), which is a valuable addition to this branch of the law. There a landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, died before the execution of the lease, but before his death the tenant had paid one quarter's rent at the increased rate. It was held that this constituted a sufficient part performance of the agreement to take the case out of the *Statute of Frauds,* and specific performance was decreed. Here the Plaintiff has acted on the faith of the parol agreement, and altered his position by letting the property at an additional rent and laying out money upon the property, which takes the case out of the statute. What, then, are the facts? The Plaintiff has altered his position to this extent, that he has entered into an agreement with *Leyshon* which *Leyshon* may seek to enforce by legal proceedings; he has, therefore, exposed himself to peril. After this *Leyshon,* with the approbation of the Plaintiff, lays out money on the property; he builds a stable, he erects a boiler, he puts in doors and windows, and lays on appliances for gas and water. The Plaintiff certainly never would have sanctioned this if he had not believed that he had a valid contract for a lease. These things were done on the faith of the parol agreement that the lease would be granted. He thought he had people of honour to deal with, and that his lease would be granted to him in pursuance of the agreement, and that they would not turn round and plead the *Statute of Frauds* against him. It appears to me that what *Leyshon* did was on the faith of the verbal contract with the Plaintiff, and I must consider that what he did was in part performance of the contract. It is of no consequence whatever whether this was done by the Plaintiff or by his sub-lessee; the money was expended either by the Plaintiff or by his authority, and it does not matter whether it came out of the Plaintiff's pocket or that of *Leyshon.*

Now, the evidence is very distinct to shew that Mr. and Mrs. *Evans* were aware of these alterations being made, and that they

(1) Law Rep. 1 Ch. 35.

were being done by *Leyshon* upon the understanding that he was to have a lease from the Plaintiff. *Leyshon* says he had seen Mr. and Mrs. *Evans*, and told them of the arrangement he had made with the Plaintiff. He told them what the buildings were to be. He says that Mr. *Evans* came there at various times, he was backwards and forwards every day, and he was glad to have the stable erected. It is also clear from this evidence that Mr. *Evans* was cognisant of what Mrs. *Evans* had been doing in letting the premises. Mr. *Evans* was as much bound as his wife by this conduct. All this could not have been done except under the belief that a lease would be granted. Then there is evidence as to the nature of the structures, and it is said that the stable was built of wood and could be removed. This might possibly be, but yet there is nothing to shew that it was a tenant's fixture.

Under these circumstances the Judge has submitted this question. He has decided that, as the Plaintiff himself had made no expenditure on the premises, there was no part performance of the agreement by him, and that what was done by the sub-tenant was only what a tenant from year to year might have done. If I should be of opinion that there was such outlay as to entitle the Plaintiff to specific performance, there must be a decree for the Plaintiff, otherwise the order for dismissal of the plaint will stand. My opinion upon this point is, that the expenditure was made by the authority of the Plaintiff, and that it operates exactly as if it had been made by himself, because it was done on the faith of the contract, and was not such an expenditure as a tenant from year to year might have made. I think this was an outlay by the Plaintiff, or by his sanction or direction, which entitled him to specific performance of the contract for a lease.

Another question has been raised in this case by Mr. *Freeling*, as counsel for the Defendant. It does not in any manner affect my decision, but, as it has been raised, I think it right to express my opinion, since it may act as a guide to County Court Judges in preparing cases for the opinion of the Court of Appeal. I am of opinion that, according to the Act of Parliament, the case does not come before me for decision generally on all the questions in the case, but only on those points which are submitted for my decision. I have looked into Mr. *Leonard's* book upon the prac-

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tice of the County Courts. Since the book was published, Mr. *Leonard* has become a County Court Judge, and it is, no doubt, a book of authority upon the practice of County Courts, and I find it there stated (1) that the case for the decision of the Court of Appeal should be prepared by the Appellant's counsel or solicitor, and a copy of the draft case should be submitted to the attorney of the Respondent for his approval. If the parties cannot agree as to the form of the case, a copy of the draft case, prepared on the part of the Appellant, must be lodged by his attorney with the Registrar, who will, after consulting the Judge, fix a day for the case to be settled and signed by him, of which notice is to be given to the parties in the suit, in order that they may appear before him and be heard on the subject of the form of the case. If, however, the parties should agree on the form of the case without the interference of the Court, then the same is to be presented to the Judge for his approval and signature. But if the Judge should not then approve of the case, the parties are to be summoned to attend him to be heard as to the form of the case.

It appears, therefore, that the parties agree upon the form of the case to be sent up for appeal. As far as my experience goes, I think the Judges in general send up their cases in a very satisfactory form, and no doubt they submit to this Court any question which the parties desire. I do not find in this case that any question is submitted as to whether the Defendant *Evans* agreed with his wife in entering into this contract for a lease, but it is clear that the husband must have considered himself bound by what his wife had done, and that it would have been vain to raise such a defence in the Court below. I should be guilty of great injustice if, under such circumstances, I were to decide the case upon a point which is not submitted to me, and which might have been quite clear upon the evidence adduced before the County Court, and when the husband had appeared before the Court and admitted that he was bound. The case shews that it was the property of the wife, and in all probability there was sufficient evidence to shew that what the wife had done the husband was satisfied with, and he adopted it. On the other hand, it is said that I could not make a decree for specific performance of a contract by the husband for a lease for thirty years of property belonging to his

(1) Page 177.

wife. The right of the husband over the property is distinct: he is entitled to the freehold in her right, and the control of the husband over the freehold estate of his wife includes a right to receive the rents and profits during the coverture, and during his own life if he retains the estate as tenant by the curtesy. I think this contract was made by the wife, who acted as the agent for her husband, and that the husband was cognizant of the acts of his wife, and sanctioned what she had done.

There was, I think, a contract to grant a lease for thirty years. If the grantee had not been in possession of the property at the time, but had thereupon entered into possession with the sanction of the lessor, and had paid rent, that would have been sufficient to constitute part performance of the contract, and to entitle the lessee to a decree for specific performance; but the lessee was in possession, and remained in possession, and I think that by the expenditure of money upon the property there was still such an amount of performance of the contract as would entitle him to a decree. This is in conformity with the principle decided in *Nunn* v. *Fabian* (1), and the case is thus taken out of the *Statute of Frauds*.

The defence is, in my opinion, an unconscionable defence, and I can find no merits on the part of the Defendant, and, according to the principle I have laid down, that the losing party must pay the costs, and as I can see no reason for deviating in this case from that principle, I must make a decree for specific performance, with costs to be paid by the Defendant. I ought to have said, that with regard to the case of *Frame* v. *Dawson* (2), I cannot coincide with that decision in the terms there laid down—that the money expended might be returned, or it might be got back from the landlord by an action at law. I must negative the proposition there laid down altogether. Where there is expenditure upon the property, it will be referred to the new position in which the man believes himself to be. I cannot think that the Courts would now concur in that decision. The case of *Parker* v. *Smith* (3) shews Vice-Chancellor *Knight Bruce's* opinion of *Frame* v. *Dawson*. He there said "the act done in that case was not distinctly referable to any agreement. It might and would have been done without any agreement; it was a matter of duty, independently of any agreement." There was no part performance in that case. It had

(1) Law Rep. 1 Ch. 35. (2) 14 Ves. 386. (3) 1 Coll. 608.

11 Jur. N.S. 866

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nothing to do with a question of part performance. Here it is an act done by a person in his new position of expending money upon the property. The decision of the County Court Judge must be reversed, and the Defendant must pay the costs of the suit, including the costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Sharp & Ullithorne*, agents for Messrs. *Simons & Plews, Merthyr Tydvil.*

Solicitor for the Defendant: Mr. *C. R. James*, agent for Messrs. *C. F. & G. James, Merthyr Tydvil.*

V.-C. M. 1874 *Feb.* 16, 23, 24, 25; *March* 2, 3 9, 10, 11; *June* 6.

CORPORATION OF HASTINGS *v.* IVALL.

[1871 H. 180.]

Trespasser on Foreshore—Possessory Title—Adverse Title of Crown—Evidence.

A possessory title sufficient against a trespasser may be established by persons claiming foreshore, without producing evidence sufficient to displace the title of the Crown.

In a suit against a trespasser by persons claiming title to foreshore and giving evidence of acts of ownership in support of their title, it is not open to the Defendant to prove any acts of ownership by the Crown except such as can be shewn to have been done with the knowledge of the Plaintiffs.

Queen *Elizabeth*, by royal letters patent, granted to the Corporation of *Hastings* certain lands in and about *Hastings*, which were liable to forfeiture, as being affected by superstitious uses, and had been previously concealed, and "all that her parcel of land and her hereditaments called the *Stone Beache* with the appurtenances in *Hastings* aforesaid, in her said county of *Sussex*, and all messuages, houses, edifices, and buildings whatsoever, with their appurtenances, in and upon the aforesaid parcel of land called the *Stone Beache*":—

Held, (1) that there was no presumption from the language of the grant against the extension of the grant to the part of the beach below high-water mark; (2) that inasmuch as it appeared that the expression "*Stone Beach*" was now applied to the entire part of the beach covered with shingle, which extended below as well as above high-water mark, and that the inferior boundary, called the "*Stone's Foot*," was liable to vary according to the state of the wind and tide, the whole present foreshore, whether now shingle or sand, must, as against a person not claiming any title in himself, be presumed to be included in the grant.

Injunction granted accordingly to restrain the deposit of earth on the sand below the *Stone's Foot.*

BY certain letters patent of the 14th of February, in the thirty-first year of the reign of Queen *Elizabeth*, which were duly inrolled,

she of her special grace, certain knowledge, and mere motion gave and granted to the Mayor, Jurats, and Commonalty of the Town and Port of *Hastings*, in the county of *Sussex*, and their successors, besides certain lands and hereditaments in the parishes of *St. Clement* and *All Saints, Hastings*, all that her parcel of land and her hereditaments called the *Stone Beache*, with the appurtenances in *Hastings* aforesaid, in the said county of *Sussex*, and all messuages, houses, edifices, and buildings whatsoever, with the appurtenances, in and upon the aforesaid parcel of land called the *Stone Beache*, then or lately built or constructed; and all those her lands, tenements, and hereditaments called *Cliffe Lands*, with the appurtenances; and all other her lands, tenements, and hereditaments lying and being in *Hastings* aforesaid, or elsewhere in her said county of *Sussex*, being theretofore given or appointed to one *Janetta A. Clyve*, otherwise *Clyffe*, or by some one, or some others, for the maintenance of an obit in the said church of *All Saints*, in *Hastings* aforesaid, and *Westham*, in her county of *Sussex*, or in one of them; and all those her lands, tenements, and pastures called *Sharpelands*, with the appurtenances; and all her lands, tenements, and hereditaments called *Magdalen Lands* and *Church Feildes*, with the appurtenances situate and lying in *Hastings* aforesaid, or within the liberties of the same; and all those her fresh and salt marshes, and other her lands, tenements, tithes, rents, and hereditaments whatsoever in *Hastings* aforesaid, with the appurtenances, or within the liberties of the same, then or not long since concealed, subtracted, or unjustly detained from her, or from her progenitors, and all the issues, rents, and yearly profits of all and singular so from her or from her progenitors subtracted or unjustly detained, from the time that the same premises came to, or ought to have come to, her hands, hitherto coming or growing; and also the advowson, donation, free disposition, and right of patronage of the rectory and church of the *Blessed Mary*, in the castle of *Hastings* aforesaid, commonly known as the *Castle Parish* and *Saint Andrew*, or by the name of one of them, with all their rights and appurtenances: To have and to hold all and singular the premises thereinbefore expressed, and subject and by the same letters patent before granted, with the appurtenances, to the aforenamed Mayor, Jurats, and Commonalty of the Town and Port of

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Hastings, in the county of *Sussex*, and their successors, to the sole and proper use and behoof of them the said Mayor, Jurats, and Commonalty, and their successors for ever: To hold after her heirs and successors of her manor of *East Greenwich*, in the county of *Kent*, by fealty only on free and common socage, and not in chief, nor on knight service, at the rent therein mentioned.

The letters patent, which were in the Latin language, also contained a clause which, as translated, was as follows:—

"Provided always, that if the aforesaid lands and hereditaments called the *Stone Beache*, in *Hastings* aforesaid, and also the aforesaid messuages, houses, edifices, and buildings built, erected, or constructed upon the aforesaid parcel of land called the *Stone Beache*, and the aforesaid lands and other the premises called *Clyffe Lands*, and the aforesaid lands, tenements, and other the premises called *Magdalen's* and *Church Lands*, and the aforesaid salt and fresh marshes in *Hastings* aforesaid; and all lands, tenements, and other the premises heretofore as is aforesaid given or appointed to the maintenance of an obit in the church of *All Saints*, in *Hastings* and *Westham* aforesaid, or in either of them, by the aforesaid *Janetta A. Clyve*, otherwise *Clyffe*, or by any other or others, except the aforesaid farms, tenements, and hereditaments as is aforesaid given, assigned, or appointed for the aforesaid obit of the aforesaid knight, and the aforesaid lands, tenements, and hereditaments as is aforesaid given, assigned, or appointed for the aforesaid obit of the aforesaid *Sharpes*, or the rents and profits of the same on the 1st day of May, in the twenty-fifth year of our reign, and before from us have not been unjustly concealed, subtracted, or detained and so unjustly concealed, subtracted, or detained, continued until the 26th day of June, in the twenty-sixth year of our reign, that then these our letters patent as to such parcel of the same premises called the *Stone Beache*, and also the aforesaid premises built or constructed upon the *Stone Beache*, and the same premises called *Clyffe Lands*, and the aforesaid premises called *Magdalen's* and *Church Lands*, and the aforesaid fresh and salt marshes in *Hastings* aforesaid by these presents before granted; and as to such parcel of the premises heretofore as is aforesaid given, appointed, or limited for the maintenance of the aforesaid obit in the aforesaid churches of *Hastings* and *Westham* aforesaid, by the

aforesaid *Janetta A. Clyve*, or any others, except the aforesaid knight's obit and *Sharpes'* obit, which, or the rents or profits of which, are not so from us concealed, subtracted, or unjustly detained, shall be void and of no effect in law; and as to the residue, they nevertheless shall stand and be good and sufficient in law, anything in these our letters patent to the contrary thereof notwithstanding."

At the date of the charter, and for long afterwards, the buildings of the town of *Hastings* were entirely inclosed within a Norman wall, which began at the castle on the west, and extended to a cliff on the east called the *East Cliff*, which formed a natural protection on that side. This inclosure comprised parts of three parishes, called respectively, *All Saints, St. Clements*, and *St. Mary-in-the-Castle*, and the sea shore, which was uninclosed, formed its southern boundary.

This district was part of a larger tract of land called the liberties of the town and port of *Hastings*, and having a frontage to the sea-shore extending for a distance of more than five miles from *Ecclesbourne* on the east to *Bulverhithe* on the west, including the entire sea frontage of *St. Leonards* as well as *Hastings*. It comprised, besides the remaining portions of the parishes of *All Saints, St. Clements*, and *St. Mary-in-the-Castle*, the parishes of *St. Andrew, Holy Trinity, St. Michael, St. Mary Magdalen*, the part of *St. Leonards* within the liberties of *Hastings*, and *St. Mary, Bulverhithe*.

Beyond this larger district there were some outlying parishes, which were also said to enjoy certain privileges, but not to be within the liberties of the town and port. The bounds of the larger district had, under the direction of the corporation, been regularly beaten till a recent period from the west side of a creek or haven at *Bulverhithe* on the west to *Ecclesbourne* on the east.

At the beginning of the present century there ran along nearly the whole of the sea-shore, except where a large mass of rock known as the "*White Rock*" projected towards the sea beyond the high-water mark, a shingly beach, the upper part of which was never under ordinary circumstances covered by the tide. It everywhere extended downwards considerably below the high-water mark, but the point where it ceased, and the sand or rock

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began, which was called the "*Stone's Foot*," varied with the state and direction of the wind and tide. Some portion of this beach above high-water mark had had buildings upon it from a very remote time.

The castle, forming the western end of the old wall, was on a steep cliff rising abruptly from the level of the shore; and before the period when building began to extend westward of this point, there existed at some little distance on the west side of the cliff a creek or haven known as the *Priory Water*, opening into the sea at a point in the parish of *St. Mary-in-the-Castle*, and running in a north-easterly direction into *Holy Trinity* parish. In early times this creek was large enough to be accessible to small vessels, and there was an old pier to protect them in entering. But the creek gradually silted up and became useless, and when building extended, the remains of it were filled up and the site built over. The precise course of the *Priory Water* and the precise site of the old pier were in dispute, but it is not material to give the details for the purposes of this report.

Some time before the year 1827 a portion of shingly land to the west of the *Priory Water*, and beyond the parish of *St. Mary-in-the-Castle*, which had once been covered by the sea, was occupied by smugglers and other adventurers, who built several tenements thereon. They hoisted an American flag, and called the place "*America*," and otherwise behaved in a lawless manner. An inquisition was held on the 6th of December, 1827, finding that the land occupied by these persons had been covered with the water of the sea, but was not then, and had not for many years past been, covered with water, and did not form any part of any manor, and that the right to the same was vested in the Crown. In pursuance of this finding the inhabitants of "*America*" were ejected under the direction of the Commissioners. It was alleged by the Plaintiffs that the corporation had acquiesced in this assertion of the Crown's rights, because they had not sufficient force at their command to dislodge the occupants of *America*, but this was disputed, and there was no specific evidence of it beyond the assertions of some recent members of the corporation.

To the west of this spot was the *White Rock* before mentioned, beyond which again part of the manor of *Gensing*, the property of

a Mr. *Eversfield*, came down to the shore, and some way further to the west, in the year 1828, *St. Leonards* was commenced to be built.

Some time afterwards the trustees of Mr. *Eversfield's* estate caused the *White Rock* to be blown up and removed, and by them and the corporation a carriage road, protected by a sea-wall, was carried along the sea frontage, and this was afterwards continued, at the joint cost of the corporation and the adjoining landowners, along the frontage of *St. Leonards*. There were three slipways left in the sea-wall for the purpose of communicating with the shore.

In the year 1852, the corporation purchased from Mr. *Eversfield* a strip of land along the shore opposite his property, and a conveyance to them was executed, including in express words all the land consisting of sea-shore and stone beach opposite the portion purchased. But he declined to enter into any covenants for title to the foreshore or stone beach, on the ground, as stated by his solicitor, that he thought the Crown might have a preferable title.

After the destruction of the *White Rock*, building continued to extend along the sea front westwards towards *St. Leonards*. In consequence of the ground rising rapidly at a short distance from the shore, it was generally necessary in preparing foundations to dig out and remove large quantities of earth and rubbish. Much of this was used up in filling in the back of the sea-wall and levelling other inequalities in the ground. But in many cases, the excavations had been tipped just below the sea-wall and left for the tide to carry away. The place of deposit was above the ordinary high-water mark, and the earth tipped over generally remained till the occasion of an unusually high tide accompanied with wind, when all the accumulations would be carried away leaving the beach quite clean.

Immense quantities of earth were said to have been disposed of in this way; but after a time it began to be considered that the purity of the sea water and the sand were beginning to be affected by the deposit, and the corporation determined to put a stop to the practice. They accordingly caused notices to be issued, warning persons against depositing materials more than six yards above the *Stone's Foot*, and threatening them with a fine of 40*s*.

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for so doing. Such notices were headed "*Hastings* Local Board of Health." The Plaintiffs relied on them as an assertion of the title of the corporation to the foreshore. The Defendant insisted that they were set up merely under the powers of the Acts hereafter stated.

To the westward of the *Eversfield* estate the property fronting the sea belonged to a Mr. *Moreing*, and it appeared that he had spent a large sum of money in laying out and building parts of a square running back from the sea called *Warrior Square*. For the purpose of preparing the foundations for these buildings as they were erected, it was necessary to dispose of a large quantity of excavated earth, and for some years prior to 1871, Mr. *Moreing* had been in the habit of getting rid of the excavated earth by having it deposited on the beach under the esplanade wall. In further prosecution of his building operations, Mr. *Moreing*, on the 1st of July, 1871, entered into a contract with the Defendant in the suit, who was then a small contractor at *Hastings*, for the removal of 7209 cubic yards of earth from the site of some intended houses at the back of *Warrior Square*. The contract was conditional on the Defendant being allowed to tip into the sea.

The Defendant then applied to the corporation for leave to tip the soil along the beach just under the sea-wall. This was refused, and in accordance, as he considered, with the notices issued in the name of the local board of health for the borough, he began to deposit the earth upon the sand below the *Stone's Foot*. The corporation then gave him notice to discontinue this practice. This, however, he declined to do, and the corporation filed the present bill, seeking to restrain him from carting or conveying earth over the beach, or depositing earth upon the beach, or any part of it, whether consisting of stone, or shingle, or sand.

The Corporation of *Hastings* claimed to be entitled under the charter of Queen *Elizabeth* to the fee simple of the entire foreshore, or, if not, at any rate to the stone beach down to the *Stone's Foot*, for the full extent of the liberties of the town and port from *Bulverhithe* to *Ecclesbourne*. The Defendant insisted that this claim had never been acquiesced in by the Crown, and that the grant in the charter was limited to the stone beach opposite the old town of *Hastings*, and comprised only so much of that as was above high-

water mark. The Plaintiffs relied on various acts of ownership as interpreting the grant in the sense for which they contended. The Defendant contended that these acts were either referable to the special powers given by the statutes hereafter stated, or were mere trespasses against the Crown. He asserted that the title of the Crown to the foreshore was not displaced by the Plaintiffs' evidence, and offered evidence of various proceedings in which he said that the Crown had asserted its title successfully against, or in the presence of, the corporation, and also evidence of other assertions of title by the Crown which were not shewn to have come to the knowledge of the corporation. The proceedings principally referred to were the inquisition of 1827, two actions, *Mace* v. *Philcox* and *Tutt* v. *Dewdney*, and the sale of a portion of foreshore to a pier company.

The action of *Mace* v. *Philcox* arose out of a grant by the corporation to *Philcox* of a license to place bathing machines on a part of the shore to the west of the *Priory Water*, which involved taking the machines below high-water mark. The Plaintiff, *Robert Mace*, was a lessee from the Crown of a portion of the foreshore, comprising that to which *Philcox's* license extended. The action was, in fact, prosecuted by the Crown, and defended by the corporation. It was tried on the 23rd of March, 1863, and resulted in a verdict for the Plaintiff, subject to the judgment of the Court upon a special case, on which, when argued before the Common Pleas, on the 25th of January, 1864, judgment was given for the Plaintiff. The case is reported (1). It appears that it was expressly stated in the special case, that for the purpose of the case it was admitted that at the time of granting the lease the Crown was seised of the land in question, and the claim of the corporation was based upon the immemorial custom of bathing from the shore at that point, and certain powers conferred on them by the *Public Health Act*, 1848, and the local Acts for regulating the borough.

The other action, *Tutt* v. *Dewdney*, related to a plot of land still further to the west. The action was in trespass by one *Tutt*, claiming title under Mr. *Eversfield*. The Defendant, *Dewdney*, claimed title under the corporation, and alleged that the land was part of

(1) 33 L. J. (C. P.) 124; 10 Jur. (N.S.) 680.

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the stone beach. The Plaintiff recovered judgment in the action; but one of the grounds, if not the main ground, relied on was, that the land was not foreshore, but an accretion to the estate of Mr. *Eversfield*, as adjoining owner. The action was indirectly defended by the corporation.

The transaction with the pier company was as follows:—About the year 1869 a company was formed for the purpose of building a pier opposite part of the site of the *White Rock*, and they obtained from the corporation, for a nominal consideration, a conveyance of so much of the land forming the site of the pier as was above high-water mark, and from the Commissioners of Woods, Forests, and Land Revenues a conveyance of so much as was below high-water mark, for a consideration of £100. The draft conveyance by the corporation originally purported to convey the land down to low-water mark, but the words effecting this were struck out on the part of the corporation. In explanation of this the town clerk stated that he was ill and absent from the office when the draft was settled, and said that, to the best of his belief, the corporation were not informed that the company had taken a conveyance from the Crown; but, on the other side, evidence was given tending to shew that they must have known of it.

By a local Act of 1 Geo. 4, c. xii., certain powers of dealing with streets, lanes, and other public passages and places, and for repairing the highways in the parishes of *St. Clements*, *All Saints*, and the part of the parish of *St. Mary-in-the-Castle* within the liberties of the town and port, were given to certain commissioners thereby appointed. And by another local Act of 2 Will. 4, c. xci., the limits of the town and port were defined as comprising those parishes only, and it was provided by s. 42, as follows:

"And be it enacted, that no person shall throw, sweep, cast, deposit, place, lay, or leave, or cause to be thrown, swept, cast, deposited, placed, laid, or left, any nightsoil, offal, muck, entrails of fish, putrid fish, oyster shells, bones, broken glass, china, or earthenware, dust, dirt, dung, ashes, refuse of vegetables, soap-suds, filth, or any putrid, unwholesome, or offensive matter or materials whatsoever, in or into or upon any of the streets, roads, lanes, footways, passages, or places, or in or into any open or uncovered place within twenty feet therefrom, within the said town

and port, or on the sea-beach, or stade, at a greater distance than six yards above that part of the sea-shore called the *Stone's Foot*, or into the sewers, channels, drains, sinks, or watercourses, within the said town and port, on pain of forfeiting for every such offence any sum not exceeding forty shillings."

The 23rd section of this Act provided that the Act should not extend to vest in the commissioners the ground or soil of the stade or stone beach within the town and port, or to give them any control over the management, direction, and repair of the capstans and other machines for winding up vessels and boats thereon, which had been managed, directed, and repaired by the corporation, and the 193rd section provided as follows:—

"And be it enacted that nothing in this Act contained shall extend, or be deemed or construed to extend, to abridge, diminish, or take away any rents, tolls, or customs belonging, due, or payable to, or had, received, or taken by, the mayor, jurats, and commonalty of the said town and port of *Hastings*, not by this Act in express terms abridged, diminished, or taken away; but that the said mayor, jurats, and commonalty, and their successors, shall and may continue to have, hold, and enjoy, all such rights, liberties, privileges, and franchises, and to have, receive, and take all such rents, tolls, or customs in like manner as they could, or might, or ought to do, in case this Act had not been passed."

There was also a local Act of the same year (2 Will 4, c. xliv.), relating exclusively to the town of *St. Leonards*, by the preamble of which the parish of *St. Leonard* was recited to be partly within the liberty of the town and port of *Hastings*, in the county of *Sussex*, and partly within the county of *Sussex* generally, and the parish of *St. Mary Magdalen*, adjoining the parish of *St. Leonard*, was also recited to be within the liberty of the town and port of *Hastings*, and the town of *St. Leonards* was recited to be partly within the parish of *St. Leonard* and partly within the parish of *St. Mary Magdalen*, and to be wholly within the liberty of the town and port of *Hastings*. By the Act the limits of the town were defined, and powers of lighting, watching, and improving the town were conferred upon certain commissioners thereby appointed to carry the Act into execution.

On the 20th of March, 1851, a provisional order, subsequently

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confirmed by Act of Parliament, was made for the application of the *Public Health Act*, 1848, to the borough of *Hastings* (which comprised the whole of the town of *St. Leonards*, as well as *Hastings*), and the corporation, together with two persons representing the west ward, were constituted the local board of health for the borough.

By the passing of the *Public Health Act*, 1872, any powers remaining vested in the Commissioners of *St. Leonards* entirely ceased.

The Plaintiffs, by their original bill, alleged that the entire beach of the borough of *Hastings* was included amongst the hereditaments comprised in the charter, and that at the time of the grant the beach was almost entirely covered with shingle, but that since that time the sand had encroached upon a portion thereof, and they claimed that the freehold in the beach was vested in them, and that the carting of earth over any part of the beach was a trespass on their ground. They also alleged that the depositing of earth along the beach had caused serious injury by making it unfit for bathing, or for the use of pleasure boats, and that they had suffered a loss of the income to be derived from licenses to place bathing machines and pleasure boats along the shore, and from stade dues for beaching colliers and other vessels, which would have unloaded there, but could no longer do so on account of the mud left by the deposited earth, and from the sale of sand, grit, and beach from the shore.

The Defendant, by his answer, drew a distinction between the town and port and the liberties of the town and port of *Hastings*, and submitted, as the true construction of the charter, that the stone beach opposite the former was alone granted. He also set up that the grant only extended to so much of the stone beach as was above high-water mark; and he alleged a custom, founded upon a usage of forty years, for inhabitants to deposit upon the shore earth and rubbish from excavations which they wished to dispose of.

The Plaintiffs, by their amended bill, alleged that from the time of the charter till the present time they had exercised acts of ownership over the whole of the beach from *Ecclesbourne* to *Bulverhithe*, except the portion opposite *Carlisle Parade*, which was

the site of the district formerly called "*America*," and the site of the *White Rock*, where there was in fact no beach in former times; and instanced that they had sold and received the purchase-money for the fee simple of portions of land alleged to have formed part of the stone beach, and had granted leases for the erection of boat and net shops, and that after the passing of the *Municipal Corporations Act* they had sold portions of the fee simple of the stone beach above high-water mark, with the consent of the Lords Commissioners of Her Majesty's Treasury. None of these dealings related to foreshore west of the *Priory Water*. They also alleged, in addition to the acts of ownership mentioned in the original bill, the construction of groynes and parade walls both east and west of the *Priory Water*, and their having instituted proceedings and obtained convictions against persons committing nuisances on, and taking away the sand, grit, beach, and shingle from the shore without their consent. They also alleged that they had for many years taken payment from persons who carried away shingle from all parts of the beach.

The bill was re-amended; and by the answer to the re-amended bill a case of *In re Magdalen Land Charity, Hastings* (1), was referred to, from which it appeared that the corporation had, as trustees, for two hundred and forty years paid the surplus income of the *Magdalen* charity lands, which were amongst those granted by the charter of Queen *Elizabeth*, to the churchwardens of the parishes of *All Saints* and *St. Clement*, for distribution amongst the poor of those parishes, and had done so on account of the distinction between the town and port and the liberties of the town and port.

The Plaintiffs put in as part of their evidence a map of *Hastings*, made in the year 1746, shewing the boundary line of the liberties of the town and port of *Hastings*, as now contended for, extending from and including the creek at *Bulverhithe* on the west, to *Ecclesbourne* on the east, and following inland between those points the line of the metes and bounds as annually beaten till recent times, and having marked upon it the various distinguishing points noted in beating the bounds.

Entries in the corporation books were put in, shewing dues

(1) 9 Hare, 624.

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charged from an early period for vessels entering the creek or haven at *Bulverhithe*, and amongst other entries on this subject was one dated in 1676, as follows:—

"It is also decreed that all shallops and other outlandish vessels which put into *Bulverhithe Haven* stretch a rope or line, and if any the master, owner, or men thereof do come on shore whereever within the liberty of this town, shall pay 12*d.* for every vessel to the said pier wardens for the time being, to be levied by them, in case of refusal, by way of distress, rendering the overplus to the parties concerned, and in default of distress to imprison the person of the gainsayers."

Another entry, nearly one hundred years old, in a book called the "Chamberlain's Book," was as follows:—

"The lime company, west of *Chalk Road*, fourteen yards out to low-water mark, as stumped, including the capstans and stade on the beach, £4."

A still earlier entry was found in the like terms, except that the description was "forty yards out to low-water mark."

The place alluded to was however to the east of the *Priory Water*.

The pier warden and others also gave evidence of the receipt of stade dues for vessels grounding and winding on the beach; but on cross-examination it was elicited that no charge was made except when a capstan was used. These capstans were fixed on the part of the stone beach above ordinary high-water mark, and there were none now existing except at one or other of the slipways. Some of the capstans belonged originally to the corporation, and others were bought, together with the sea frontage, from Mr. *Eversfield*. It appeared also that private owners of other capstans exercised similar rights.

Entries in the corporation books were put in, shewing receipts for payments for sand, grit, beach, and shingle taken from between high and low-water mark at places to the west of the three original parishes, and licenses to take those materials without payment, and convictions for taking these materials without leave were proved. These were, however, all in recent times, and the Defendant put in evidence to shew that persons had frequently been allowed to take these materials without payment being made

or leave given; that the commissioners of *St. Leonards* had themselves dealt with the beach opposite their town, by an absolute prohibition of taking away the beach, on the ground that such acts would destroy the benefit derived from the groynes along the shore. They had also removed rock from, and in other ways dealt with the beach. The Defendant also gave evidence of frequent communications between the *Hastings* authorities and the Commissioners of Woods, Forests, and Land Revenues, with reference to the claims of the Crown, and that placards had been placed by the Commissioners of Woods, Forests, and Land Revenues, and allowed to remain at various points about the shore, warning trespassers against interference with the rights claimed by the Crown, and it was shewn that the right of the Crown to take wreck had never been disputed.

Old conveyances and leases of portions of the stone beach by the corporation, for rope walks and other similar purposes, were also put in. Some of the plots of land comprised in these documents were to the west of the *Priory Water*, but it was shewn by the Defendant that the whole were necessarily of plots of land above high-water mark, and that it was only in recent times that any such sales or leases had been made of plots of land to the west of the *Priory Water*.

The corporation also gave evidence of having granted licenses for money considerations to the owners of pleasure boats and bathing machines, to place their boats and machines upon the beach; but it was shewn that the licenses were only such as they were empowered to grant under the powers of their Acts, without reference to any question of ownership of the foreshore.

They also gave evidence of having constructed groynes at intervals along the coast, to prevent encroachments by the sea, and of having built parade walls along the shore, partly by themselves and partly in conjunction with the owners of land bordering along the shore. But the Defendant's evidence went to shew that before the corporation purchase from Mr. *Eversfield* he had constructed and kept in repair some of the groynes opposite his property, and that further along there were groynes which had been erected and maintained by the Crown. The parade walls were wholly above the ordinary high-water mark, and left below

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them a portion of the stone beach, which was only covered by the tide on extraordinary occasions.

The bill was filed on the 22nd of July, 1871. Attempts were made to agree upon certain places at which excavations might be deposited, but no arrangement was come to, and on the 3rd of August, 1871, an injunction was granted till the hearing, in accordance with the prayer of the bill.

The suit now came on for hearing. It came out in the cross-examination that the Defendant had ceased to have any connection with *Hastings*, having left it, as he stated, in consequence of the suit, and that he had an indemnity from Mr. *Moreing*.

Mr. *Glasse*, Q.C., Mr. *Ellis*, and Mr. *Hurst*, for the Plaintiffs:—

The Defendant in this case being a mere trespasser, it is not necessary to shew such a title as would have been required in a suit against the Crown as an adverse claimant: *Lowndes* v. *Bettle* (1); and the question has not yet been decided in favour of the Crown. The title of the Crown was not really raised in *Mace* v. *Philcox* (2). The ownership was assumed for the purpose of the special case, and the rights of the parties were treated as depending upon entirely different considerations. There can be no question as to the right of the Crown to grant the foreshore between high and low-water mark, so that it only remains to prove in the present case that such a grant has been made, and as against a mere trespasser it is not necessary to argue the construction of the grant, or do more than shew the exercise of acts of ownership for a short period and of a comparatively slight character. Apart from absolutely negativing the claim of the corporation, the Defendant can have no defence to the suit. Anything like prescription is impossible, and there can be no custom to deposit rubbish on the shore. Such a custom would be bad, as tending to the destruction of the property included in the grant.

The Defendant could not, as against the Crown, be entitled to set up the title of the corporation, and he can no more be allowed to set up against the corporation the title of the Crown.

There can be no question that some part of the stone beach was included in the charter, and if it is made clear that it extends

(1) 33 L. J. (Ch.) 451. 10 Jur. N.S. 226

(2) 33 L. J. (C. P.) 124; 10 Jur. (N.S.) 680.

beyond the parishes of *St. Clement, All Saints*, and *St. Mary-in-the-Castle*, *primâ facie* it must be presumed to comprise the stone beach along the whole of the foreshore.

No amount of usage could give the right to take shingle to any one not the owner of the foreshore: *Attorney-General* v. *Mathias* (1); *Gateward's Case* (2); *Blewett* v. *Tregonning* (3). A custom to take soil away from any land is bad, and the same principle applies to a custom to deposit soil *in alieno solo: Murgatroyd* v. *Robinson* (4); and if attempts are made to shew that in past times similar acts have been done without objection, the answer is, no adverse right begins to be acquired till the acts complained of begin to cause injury: *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (5).

An ancient grant is construed by very different rules to a modern one, and where its meaning is doubtful it must be interpreted by usage. Therefore, here all that the corporation require to prove is an exercise of acts of ownership over the foreshore. It is quite unnecessary to shew a legal title: *Graham* v. *Peat* (6); and a very short possession will be sufficient, even where it appears that there is no legal title: *Every* v. *Smith* (7); or where there has been only a possession of three or four months: *Dyson* v. *Collick* (8). *Mace* v. *Philcox* (9) was, in fact, decided upon this principle, and, as appears from the report in the *Jurist*, it was based upon *Blundell* v. *Catterall* (10); and if the action of *Tutt* v. *Dewdney* has any bearing upon this present suit, it is in favour of the Plaintiffs, because in it the rights of the parties were treated as depending entirely upon possession apart from title. Something is attempted to be made of *In re Magdalen Land Charity, Hastings* (11); but it does not in any manner affect the present question, which depends upon evidence of acts of ownership shewing possession as against a mere trespasser. The form of the conveyance to the pier company was a mere inadvertence, which would not have happened except in the absence of the town clerk,

(1) 4 K. & J. 579.
(2) 4 Rep 59 b.
(3) 3 A. & E. 554.
(4) 7 E. & B. 391.
(5) Law Rep. 1 Ch. 349.
(6) 1 East, 244.
(7) 26 L. J. (Ex.) 334.
(8) 5 B. & A. 600.
(9) 33 L. J. (C. P.) 124; 10 Jur. (N.S.) 680.
(10) 5 B. & A. 268.
(11) 9 Hare, 624.

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and, at the most, it is not an admission of adverse right by the corporation.

Mr. *Cotton*, Q.C., and Mr. *Hemming*, for the Defendant:—

This is a matter of great importance to Mr. *Moreing* and persons in a similar position. The question to be determined is, whether the Plaintiffs have made a case such as entitles them to have the injunction granted them made perpetual. The corporation have powers under the Public Health Acts for regulating the use of the beach, and if those powers do not enable them to prevent the acts complained of in the bill, it must be assumed that the acts are not such as it was intended that they should have power to restrain.

The case made by the bill is not consistent with itself. There are first of all two separate titles put forward, viz., the charter of Queen *Elizabeth* and the conveyance by Mr. *Eversfield*, and inconsistently with them a title by possession alone is set up. But the acts complained of are really no interference with even the rights claimed by the corporation, all that the Defendant wishes to do being, to deposit the earth below the *Stone's Foot*, which is in any view the limit of the corporation property.

If the grant in this case had been of the foreshore the meaning would have been perfectly plain. The boundary is determined by *Attorney-General* v. *Chambers* (1); and a grant might have been made of it by the Crown. But that has not been done in the present case. The well-known expression "foreshore" is disregarded, and an entirely different word is used, and it is unreasonable to suppose that the same thing can have been intended. The evidence shews clearly that the stone beach is at all events partly above high-water mark, and it is much more likely that it was intended to grant simply the shingly ground above high-water mark than a tract with a variable boundary like that formed by the *Stone's Foot*. Moreover, the form of the grant shews that it was only intended to convey what had lapsed from being affected with superstitious uses, and not that which belonged to the Crown at common law, and there is no suggestion of a previous alienation by the Crown. In the case of

(1) 4 De G. & J. 55; 4 D. M. & G. 206.

grants made by the corporation subsequently to the charter, the part granted is called "waste," which implies that it was part of a manor originally, and cannot therefore have belonged to the foreshore originally vested in the Crown.

All the acts of ownership sought to be established are either such as the corporation were entitled to perform under their local Acts, or the Public Health Acts, and not as incident to property, such as making groynes, licensing bathing machines, licensing boats, and making drains. Others, such as grounding and stade dues, which were, in fact, dues for the use of the capstans, are not evidence of any right below high-water mark, because the capstans must have been above that line: and before the conveyance by Mr. *Eversfield* it is clear that he, if any one, must have received the payments for the use of capstans opposite his property, as other people have done since. The stade is, in fact, the part of the beach above high-water mark, and the receipt of stade dues can be no evidence of title below high-water mark.

As to the removal of shingle and sand, it may be admitted that the corporation have shewn that they received payments for it; but at the most it would only be evidence of an easement, not of property, in the soil. And these rights have not been exercised uniformly, or at all, opposite *St. Leonards*. There the *St. Leonards* Commissioners exercised the right of dealing with the shingle, and prohibiting its removal; and before 1858 it does not appear that the corporation attempted to exercise any powers as to controlling the removal of shingle westwards of the *Priory Water*.

Treating this as a question of proving a right by possession as against a trespasser, the possession must be such as will rebut the presumption of the right to the foreshore being in the Crown. There can be no right to possession of the sea-shore without a title as against the Crown, and the mere exercise of acts of ownership in recent times affords no presumption of a lost ancient grant. Even wrongful possession without title is ordinarily sufficient as against a trespasser, but where the true title is in the Crown, there can be no wrongful or other possession in any one else. The Crown is always deemed to be in possession if it has a title. If, therefore, we prove that the title is in the Crown, the Plaintiffs can have no such possession as to maintain this suit. To establish their case

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they must displace the title of the Crown. In *Graham* v. *Peat* (1) the distinction is drawn between a right to land and to such a thing as the foreshore, and the case there referred to, *Carter and Claycole's Case* (2), brings out the difference between the position of the Crown and a private owner, and shews that where there is a presumption of right in the Crown an action of trespass or a suit for an injunction cannot be maintained. In *Lowndes* v. *Bettle* (3) the question was whether uninterrupted possession for a long period gave a presumption of right, but that has no application here, for the reasons we have given. We start here with the fact that the foreshore must once have been vested in the Crown. Against the acts of ownership alleged we can give strong counter evidence of possession by acts of ownership of the Crown. The sale and conveyance by the Commissioners of Woods, Forests, and Land Revenues of the site of the pier was stronger evidence of possession than anything done by the Plaintiffs.

The correspondence shews that the Crown have claimed and exercised the right of dealing with the foreshore below high-water mark. The undisputed claim by the Crown to take wreck is *primâ facie* inconsistent with a supposed grant of the foreshore.

Though the evidence is very far short of shewing any substantial injury by the acts of the Defendant, no amount of injury would give the corporation a title if they cannot shew one *aliunde*.

It was sought, in the course of the arguments on behalf of the Defendant, to put in evidence tending to shew a title in the Crown to the actual foreshore. Amongst other documents tendered was a report by the Commissioners of Woods, Forests, and Land Revenues.

Mr. *Glasse*, Q.C., objected that it was not evidence against the Plaintiffs.

Mr. *Cotton*, Q.C.:—

This is a report made by public officers in pursuance of an Act

(1) 1 East, 244. (2) 1 Leon. 306.
(3) 33 L. J. (Ch.) 451. John MS. 226

of Parliament. It is as much a public document as a register of births, deaths, and marriages.

SIR R. MALINS, V.C.:—

I think the Defendant is not entitled to put in evidence anything tending to shew an adverse title in the Crown, unless he brings its existence to the knowledge of the Plaintiffs. The document, therefore, cannot be allowed to be put in.

This decision covered various other pieces of evidence which it was proposed to put in to shew acts of ownership by the Crown as to which it could not be proved that the corporation were cognisant of them.

Mr. *Glasse*, in reply upon the case:—

That modern usage may be brought forward to explain an ancient grant is shewn by *Duke of Beaufort* v. *Corporation of Swansea* (1); *Lord Waterpark* v. *Fennell* (2).

June 6. SIR R. MALINS, V.C.:—

The original bill in this suit was filed on the 22nd of July, 1871, by the Plaintiffs, who claimed to be the owners of the sea-beach at *Hastings*, to restrain the Defendant from carting or carrying earth over the beach, and also from depositing earth on the beach, whether consisting of stone, shingle, or sand. A motion for an injunction was made shortly after the filing of this bill, and on the 3rd of August, 1871, I made an order for an injunction in conformity with the prayer of the bill. That injunction has remained in force ever since, and the case having been heard, and elaborately and ably argued during ten days, the question I have now to decide is, whether that injunction is to be continued or the bill dismissed.

The Defendant *Ivall* was, in 1871, a contractor in a small way of business at *Hastings*, and having entered into a contract with Mr. *Moreing*, who is the owner of building ground near *Warrior Square*, *Hastings*, and of many houses in that square, to excavate a large

(1) 3 Ex. 413. (2) 7 H. L. C. 650.

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quantity of earth from that place, applied to the town council of the borough for permission to deposit the earth on the beach, but the town council refused permission, on the ground that such a deposit would be a nuisance to the town, and prejudicial to its interests, and on the 8th of July, 1871, the Plaintiffs gave notice to the Defendant that if he did deposit the earth as proposed an application would be made to this Court for an injunction to restrain him from so doing. Notwithstanding this refusal and notice, the Defendant on each day, from the 8th to the 18th of July inclusive, carted and deposited sixty loads of earth on to the shore below the *Stone's Foot*. This led to the institution of the suit, and to the granting the injunction. The motion for the injunction was supported by a large body of evidence to shew that what the Defendant was doing was then, and would continue to be, a nuisance to the town, and injurious to all frequenters of the beach, whether for the purposes of bathing or otherwise. [His Honour then referred to some of the affidavits, and continued :—] A great number of affidavits were also filed on the part of the Defendant. They do not, and could not, deny that the deposit on the beach would be a nuisance if the earth deposited remained there, but they stated that the tide would immediately remove it; but this fact is contradicted by the positive experience of the Plaintiffs' witnesses. The Defendant's witnesses also contended that it had been the usage for many years to deposit earth upon the beach, and they claim the right to do so. The Plaintiffs did not desire to prevent the deposit of the excavated earth altogether, but only at such places as would cause a nuisance to the town and its visitors. They accordingly offered, on the hearing of the motion, that the Defendant, and those who were in the same position as himself, should deposit the earth at places some distance to the east and the west of the place where it was actually deposited. It became, therefore, a mere question of expense, and it has been argued throughout, on the part of the Defendant, on that ground. On the subject of the nuisance a large body of evidence has also been given since the injunction was granted :—[His Honour then referred to, and commented on, the evidence adduced in support of this part of the case, and continued :—]

Now it being, in my opinion, clearly established that the in-

junction of the 3rd of August, 1871, ought to be continued, its continuance would have been a matter of course had there been no contest in the case as to the rights of the Plaintiffs to maintain the suit. But before entering into this question I will advert to the position of the Defendant, who raises the question as to the rights of the Plaintiffs. It appears from his cross-examination that he has now left *Hastings*, and may possibly never see *Hastings* again, so that he has not the slightest interest in this enormous litigation, which he has been the instrument of forcing upon the Plaintiffs, and has no means of paying the costs if it should terminate against him. He is, in fact, the mere tool of Mr. *Moreing*, who carries on the suit in his name, and thereby escapes the peril of having to pay the costs, although he would have the benefit of the litigation if it should terminate in favour of the Defendant. But this state of things, it is said, was attributable to the Plaintiffs themselves for not having amended their bill and made Mr. *Moreing* a Defendant; and I think they might have done so on the admission by Mr. *Moreing* himself that the Defendant *Ivall* was merely his agent.

The Plaintiffs claim the right to the sea-shore at *Hastings* under a grant from Queen *Elizabeth*, who by letters patent of the 14th of February, in the thirty-first year of her reign, among other things, granted to the mayor, jurats, and commonalty of the town and port of *Hastings*, "All that her parcel of land and hereditaments called the stone beach, with the appurtenances, in *Hastings* aforesaid":—[His Honour then read the portion of the grant above set forth, and continued:—]

This grant includes, with slight exceptions, to which I shall more particularly refer, the whole of the beach down to low-water mark.

The Plaintiffs further contend that whether they are or are not, by virtue of this grant, entitled to the beach as against the Crown, they are, at all events, in the possession of it, and have long been so, as shewn by the various acts of ownership which they have exercised, and are consequently entitled to maintain trespass as against a wrongdoer, and, therefore, to restrain the Defendant from continuing the wrongful acts which he has committed by the deposit of the earth in question. The Defendant, on the other

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hand, contends that the grant of the stone beach extends only to so much of the land covered with shingle as is above high-water mark, and does not include the part of the beach on which the earth was deposited by the Defendant, and that the stone beach at *Hastings* does not extend beyond the parishes of *All Saints, St. Clements,* and *St. Mary-in-the-Castle,* in which the whole of the town of *Hastings* was situated in the reign of Queen *Elizabeth,* and of course he disputes the possession and the acts of ownership relied on by the Plaintiffs.

The Plaintiffs, on the other hand, contend that the stone beach means the whole of the beach between ordinary high and low-water mark, and that the beach at *Hastings* means the town and liberties of *Hastings,* from *Ecclesbourne* on the east to *Bulverhithe* on the west, being a distance, as I understand, of about five miles, and therefore extending to other parishes than the three in which the town of *Hastings* was built.

With regard to the construction of the charter, the beach is no doubt called the stone beach because it was then mainly, as it is now to a great extent, covered with stones and shingle, and as the witnesses on both sides concur in stating that the beach changes in character from time to time, it is not improbable that much of what is now sand was then shingle, and inasmuch as the word "beach" primarily means the shore, including that which is covered with water at high and uncovered at low tide, if it had been intended to restrict the grant to that part of the beach only which was above high-water mark, I am of opinion the words of restriction would have been found in the grant itself. In my opinion, therefore, the words must be taken in their evident sense as meaning the whole of the beach whether above or below. [His Honour then referred in detail to the evidence put in by the Defendant to shew that the stone beach only comprised that part of the beach which was above high-water mark, and stated that they had been entirely broken down on cross-examination, and that in the result they nearly all concurred with the Plaintiffs' witnesses in considering that it meant the whole of the beach down to the *Stone's Foot.* He then continued:—]

The Plaintiffs' witnesses all treat the stone beach as extending to low-water mark, and it is clear that it does so extend.

Then I may refer to a case cited by Mr. *Glasse*, in his reply, *Duke of Beaufort* v. *Corporation of Swansea* (1), which establishes that the meaning of the words in ancient grants must be interpreted by modern usage.

The marginal note is this: "The sea-shore between high and low-water mark may be parcel of the adjoining manor; and where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible in evidence to shew that such sea-shore is parcel of the manor. Thus evidence of modern acts of ownership was held to have been properly admitted as evidence to shew that grants by King *John* and King *Edward* I. of certain lands by the terms of *Terra de Gower* and *Dominium de Terræ de Gower*, included the sea-coast down to low-water mark. And, *per Parke*, B., all ancient grants may be explained by evidence of modern usage upon a question as to what passed by such documents."

Lord Chief Baron *Pollock*, in giving judgment, says (2): "You cannot say that the spot which the Plaintiff claims is his, as being part of the seigniory of *Gower*, merely from those words;"—so, in the present case, you cannot say that the spot in question is granted merely under the words "stone beach."—"But," he continues, "if by usage, which is of so long standing that we may presume it to be contemporaneous with the grant itself, the sea-shore in question has always been considered to be part of the seigniory of *Gower*, then you will take the grant and the usage together; or, in the language of the learned Judge,"—who was Mr. Justice *Williams*—"'looking at all the evidence in the cause'—not the documentary evidence alone (which he expressly tells the jury does not necessarily carry the right of the Crown)—but looking at the grant coupled with the usage, you are to form your own opinion. I think that direction is perfectly correct, and that so far as it relates to this matter the rule must be discharged." Then Mr. Baron *Parke* says (3): "The only question is, whether, it being uncertain how much constituted the *Terra de Gower* at the time, in the reign of King *John*, modern usage may be made use of as evidence to shew what was comprised within the limits of the manor; that is, what was the boundary of the manor, both upon the land side and the

(1) 3 Ex. 413. (2) 3 Ex. 424.
(3) 3 Ex. 425.

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sea side. Unquestionably if evidence may be given to shew what was the boundary of the manor upon the sea side, the evidence here shews that in point of fact the manor in the hands of the Crown, and possibly in the hands of a subject before, was actually bounded by the then line of demarcation, namely, the low-water mark."

And then Mr. Baron *Rolfe* says (1): "I am entirely of the same opinion; and, indeed, I think the Attorney-General admits that the ruling was quite correct when the learned Judge told the jury this: 'The terms of the grant do not necessarily include the sea-shore, but they may include it if the other evidence in the cause would lead you to suppose that they did include it.' The Attorney-General says it may include the sea-shore, but only, as he says, in one particular way, namely, if it originally belonged to the subject, and came to the Crown as parcel of the manor, and the Crown re-granted it. There is nothing in the ruling inconsistent with that. All the learned Judge says is, *terra* may in point of law include it, and you must look to all the facts of the case, and see whether they shew that it did or did not."

The same principles are laid down in the House of Lords, in the case to which I referred, of *Lord Waterpark* v. *Fennel* (2), which was a question of what passed by a very ancient grant.

The next point relied upon by the Defendant was, that whatever might be the extent of the beach included in the grant, that is, whether it was the whole, or that only which was above the high-water mark, inasmuch as the whole town of *Hastings* was at the date of the grant to the east of the stream called by the name of the *Priory Water*, the grant did not extend to anything to the west of that water, and not, therefore, to the part of the beach on which the Defendant had deposited the rubbish or earth, and proposed to continue to deposit it. The grant is not of the beach in or adjoining to the town, but in *Hastings*, and that the Plaintiffs contend, and, in my opinion, rightly contend, means at the town and port of *Hastings* and the liberties thereof. The recital of the grant speaks of the barons and inhabitants of the town and port of *Hastings*, and the grant is to the mayor and so forth of the town and port of *Hastings* aforesaid. What, then, was meant by the

(1) 3 Ex. 426. (2) 7 H. L. C. 650.

town and port of *Hastings* and the liberties thereof? Now, I think the most material document is this map of 1746, which comes out of the muniments of title of the Plaintiffs. It has been used ever since. [His Honour then described the map, and continued:—] It extends from *Ecclesbourne,* on the east, to *Bulverhithe* on the west, comprising a distance of about five miles, and includes the sea-shore along the whole, shewing that the whole length is within the town and port of *Hastings.* [His Honour then referred at length to the evidence given by the members of the corporate body, the officers of the town, and others, and continued:—] All concur in proving that the map of 1746 has always been considered as correctly shewing the boundaries of the town and port of *Hastings* and the liberties thereof, and is the guide of beating the bounds, and that the Plaintiffs have exercised acts of ownership over the beach to the west as well as to the east of the *Priory Water;* and though the acts of ownership have been less frequent over the former part, because the town did not extend in that direction till within the last forty years or thereabouts, yet they are positive and distinct upon that, and shew that this was no new notion. I do not refer to the documents in detail, because where a case begins with a grant such as this of *Elizabeth,* slight acts of ownership are quite enough to interpret it by and shew what it meant; but I read one, which is as old as the year 1676, because the real question is whether the corporation were not and are not entitled to anything west of the *Priory Water,* and *Bulverhithe* is two and a half miles to the west. [His Honour then read the entry of that date, and continued:—] The corporation could only impose that fine with regard to *Bulverhithe* in the belief that the grant of Queen *Elizabeth* extended from *Ecclesbourne* to the west of the haven at *Bulverhithe.* Then there is also, long before these disputes arose, another entry in the chamberlain's book: "The lime company west of *Chalk Road,* 14 yards out to low-water mark, and to the west side of the said road as stumped, including the capstans and stade on the beach, £4." That gives them the right of going down to low-water mark, and that could only be because the corporation considered that they were entitled down to that point. It is also, as it appears to me, a most material circumstance, that

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though the right of the Crown to the sea-shore between high and low-water mark is undoubted, *Attorney-General* v. *Chambers* (1), yet the Crown, jealous as it is of its rights, has never voluntarily interfered with the rights asserted by the Plaintiffs, although its officers have been well aware of the acts of ownership exercised by them over the shore at *Hastings*. On the contrary, those rights have on several occasions been recognised by the Crown. [His Honour then referred to parts of the evidence as bearing upon this point, and continued:—]

Then the Defendant relies upon certain transactions of the Plaintiffs as amounting to an admission by them that the right to the beach or foreshore was in the Crown and not in themselves. These transactions are, first, the proceedings in the inquisition of 1827 as to the district called "*America*;" secondly, proceedings in the action of *Mace* v. *Philcox* (2); and thirdly, the grant to the pier company of the 10th of November, 1869. He also relies upon the fact of the grant of the stone beach by Mr. *Eversfield* as being inconsistent with a title which is set up to the whole of the beach under the charter of *Elizabeth*. Now with regard to the inquisition of 1827, the facts were that a troublesome set of people established themselves upon the stone beach, or a part of it, and the corporation were very desirous of getting rid of them. They might have had strength to have forcibly removed these people themselves, but they applied to the Crown for assistance, and there can be no doubt whatever that the proceedings in that inquisition did amount to an admission by the corporation that the Crown was entitled to that part of the sea-beach.

Then again, as to the grant to the pier company. There was an Act of Parliament obtained for the establishment of a pier, and it became necessary for the pier company to have the right to erect their pier between high and low-water mark and out to sea. It is perfectly clear that the corporation could have no right below low-water mark. Beyond that point they must rely on the grant from the Crown. But if the corporation are right in this suit, they are entitled down to low-water mark. It happens that when the draft conveyance to the pier company was settled by the cor-

(1) 4 De G. & J. 55; 4 D. M. & G. 206.

(2) 33 L. J. (C.P.) 124; 10 Jur. (N.S.) 680.

poration the words "down to low-water mark," originally in the grant, were struck out, and the grant was expressly limited to the part entirely above high-water mark; and although the explanation that the alteration was made in the absence of the town clerk from illness, and without his knowledge, is entitled to some weight, there does remain the fact that the corporation, inconsistently with the case they now set up, cautiously or incautiously abstained from granting anything below high-water mark.

There is also the fact of the grant of the beach by Mr. *Eversfield.*

I have carefully considered all these circumstances. They have caused me much trouble in coming to a conclusion as to what is the proper view of them, and I am bound to say it is impossible to deny that the conduct of the corporation in these transactions is inconsistent with the title they now set up to be the owners of the whole of the beach from *Ecclesbourne* to *Bulverhithe;* and if the question were now between the Crown and the corporation, as to whether the former or the latter were entitled to the foreshore, the facts might be of very great importance. But however strong those transactions may be as shewing an admission by the corporation of a title in the Crown, I am of opinion that they cannot be set up by the Defendant as against the Plaintiffs, who are clearly shewn to be in possession of the whole beach, and by virtue of such possession, whether rightful or wrongful, are, as against the Crown, entitled to restrain the unlawful proceedings of the Defendant. It is impossible, in my opinion, for a trespasser on an estate to justify his trespass by shewing that the person in possession, who seeks to restrain the trespass, has at a former period, either by word or act, admitted that some other person than himself was entitled to the estate. Notwithstanding those admissions or acts of the Plaintiffs, it is clear that they are in the possession of the part of the beach upon which the Defendant has deposited the rubbish, or earth, and such possession, whether the right to it was acquired under the charter of *Elizabeth* or otherwise, entitles them to restrain the proceedings of a wrongdoer. In *Graham* v. *Peat* (1) it was decided that one in possession of glebe land under a lease which was void under the statute of *Elizabeth* by reason of the rector's non-residence, may yet maintain trespass upon the possession against a wrong-

(1) 1 East, 244.

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doer; and in *Dyson* v. *Collick* (1) it was held that contractors in possession of a dam erected with the permission of the owners of the soil could maintain trespass as against a wrongdoer. It is, in fact, clearly a settled rule of law, that possession, however slender the title to it may be, is sufficient as against a wrongdoer. Whatever, therefore, may be the effect of these transactions as between the corporation and the Crown, I am of opinion that they cannot be set up by the Defendant as a justification or excuse for his wrongful acts against the possession. It is scarcely necessary to mention the action of *Tutt* v. *Dewdney*, which was much relied on by the Defendant's counsel, because it is clear that it raises no other question than whether the piece of land in question there was part of the beach or of the estate of Mr. *Eversfield*, and the evidence shewed it to be the latter. The case really has, therefore, no bearing whatever on the present question.

It was contended by the Defendant's counsel, and particularly by Mr. *Cotton*, that several of the acts of ownership relied on by the Plaintiffs were referable to the powers conferred on the Plaintiffs by two local Acts of 1 Geo. 4, c. xii., and 2 Will. 4, c. xci.; and it may be conceded that the latter Act does give the corporation certain powers with regard to the groynes, bathing-machines, and pleasure-boats, which they would not otherwise have had except by virtue of their ownership, and particularly with regard to levying fines; but that does not touch the various other acts of ownership relied on by the Plaintiffs; and the 23rd section of 2 Will. 4, c. xci. contains a most material enactment:—[His Honour then read the 23rd and 193rd sections of the Act, and continued:—] Now that being an Act in the year 1832, unless the Legislature had before it some evidence that the corporation was entitled, or claimed to be entitled, to the sea-shore under the charter, it is difficult to see for what reason such exceptions were put in; then with regard to what is within the liberties of the town and port of *Hastings*, it is also very material to see what is said in this Act. [His Honour then read the recitals in the preamble of the Act, and continued:—] It recognises, therefore, the whole of the town of *St. Leonards* as within the liberties of the town of *Hastings;* within the meaning therefore, I apprehend, of the charter of *Elizabeth*.

(1) 5 B. & A. 600.

Now, upon the whole case, I am of opinion that the Plaintiffs have established their title to restrain the proceedings of the Defendant, as they have been restrained by the injunction of the 3rd of August, 1871. That injunction has had a most beneficial effect, as has been proved by the evidence to which I have referred, and it must therefore be made perpetual, and the Defendant must pay the whole costs of this suit. In making the order that he must do so I am aware of its futility, because of his inability to meet them unless the Plaintiffs should be able to enforce it by some indirect means through the indemnity he has from Mr. *Moreing*. I regret that it is not in my power to make Mr. *Moreing* pay the costs of this enormous litigation, which he has, in my opinion, most unjustifiably forced upon the Plaintiffs for the mere purpose of saving himself the expense of carting his excavations to a greater distance, where the Plaintiffs were perfectly willing that they should be deposited, because they would at that place be carried away by the washing of the sea in time to prevent their becoming a nuisance to the town or its visitors. His contention that he should have the absolute and uncontrolled liberty of depositing any quantity of earth or rubbish on the beach, and where, when, and as he thinks proper, is, in my opinion, most unreasonable and unsustainable.

The Defendant appealed against the decree, but before the appeal came on for hearing, the Plaintiffs moved the Appeal Court that the Defendant might be ordered to give security for the costs of the litigation before the appeal was heard, and that meanwhile the hearing of the appeal might be stayed; and on the 7th of July, 1874, the Lords Justices ordered accordingly. The case is reported on appeal (1).

On the 18th of January, 1875, the Defendant applied to the Court of Appeal to discharge the order of the 7th of July, 1874, and an arrangement was come to by which the Defendant agreed to abandon the appeal on an undertaking by the Plaintiffs not to take any steps to enforce the payment of costs.

Solicitors: Mr. *J. H. Lyddal;* Messrs. *Walker & Martineau.*

(1) Law Rep. 9 Ch. 758.

V.-C. B. 1875 Feb. 9.

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

RICHARDSON'S CASE.

Company—Winding-up—Contributory—Infant Transferee.

7HL537
KLD563-4

W. A. R. purchased shares in a company, and paid for them, but took a receipt and signed the transfer deed as transferee in the name of *F. W. R.*, his son; and the shares were registered in the name of *F. W. R.*, who was then and still was a minor.

Upon the company being wound up, and the name of *F. W. R.* being placed on the list of contributories:—

Held, that the register of members and list of contributories must be rectified by substituting the name of *W. A. R.* for that of *F. W. R.* on both.

ADJOURNED SUMMONS.

This was an application on the part of the *Imperial Mercantile Credit Association* that the register of shareholders and list of contributories might be rectified by substituting the name of *William Arthur Richardson* for that of *Frank William Richardson* in respect of twenty shares.

In 1864, or early in 1865, Mr. *William Arthur Richardson* purchased from a Mr. *Chapman* twenty shares in the association, and paid for them. The name of the transferee was given as *Frank William Richardson*. In one of the transfer deeds, dated the 31st of January, 1865, which was for ten shares, *Frank William Richardson* was described as of *Walthamstow*, gentleman. In the other, dated the 28th of March, 1866, he was described as of *Edith Road, Belvidere, Kent*, Esquire. Mr. *W. A. Richardson* himself executed the deeds in the name of *Frank William*, and applied to the company for registration of the deeds in that name, which was accordingly done.

Upon application to *Frank William Richardson* for payment of calls, the answer was that he was a minor.

The fact was that *Frank William* was a son of Mr. *W. A. Richardson*, and at the time of the purchase and transfers was a boy at school.

Mr. *W. A. Richardson* in an affidavit stated that his son *Frank*

had no property of his own, and never had any that he (witness) was aware of, and he (witness) was never trustee of any property for him. He (witness) bought the shares for him because he had the money to spare, and thought it the best thing he could do.

Mr. *Kay*, Q.C., and Mr. *Ince*, for the liquidators:—

The case is simply that Mr. *Richardson* chose to adopt an *alias*, but that does not make him the less the purchaser of these shares: *Weston's Case* (1); *Pugh and Sharman's Case* (2).

If this gentleman had used the name of a non-existent person he could not have escaped by this device. Having executed the deed, he either signed his own name, or, if he used another name, he must, in order to escape the charge of forgery, admit that he adopted that other name as his own.

Mr. *H. A. Giffard*, for Mr. *Richardson*:—

This was a purchase by a father in the name of his son for the purpose of advancing him. The purchase was *bonâ fide*.

The cases cited do not govern the present. There is no instance in which a father has been made liable, except where he himself was the transferor to the son, which was *Weston's Case*, or where he himself applied to the company for the shares, as in *Pugh and Sharman's Case*.

This is the ordinary case of a transfer to an infant, in which case the transferor is the person liable, at least in the first instance: *Capper's Case* (3): *Mann's Case* (4). The liquidators should not have passed over Mr. *Chapman*, who was first liable, and who may possibly have had a good defence.

The deeds at any rate were only voidable; they were not void until repudiated by the transferee after he had come of age: *Ebbett's Case* (5).

SIR JAMES BACON, V.C.:—

This is one of the most transparent cases I ever saw in my life. Anything may be argued, no doubt; and any argument may be

(1) Law Rep. 5 Ch. 614.
(2) Ibid. 13 Eq. 566.
(3) Law Rep. 3 Ch. 458.
(4) Ibid. 459, n.
(5) Law Rep. 5 Ch. 302.

V.-C. B. 1875 RICHARDSON'S CASE.

supported by references to reported cases; but it would be entirely opposed to every principle of justice and common sense if I were to hold that, because a man goes into the market and buys property under an *alias*, and having paid the money, takes a receipt, and signs the deed whereby he becomes the legal owner under that *alias*, he is not to be held to be the purchaser. If he had bought an estate under the name of *John Brown*, his real name being *William Smith*, is it possible to contend that he would not be compellable to fulfil the contract?

Mr. *Giffard* contended that the case must be treated as if it were not one of *alias*, as if the name of the infant were rightly on the register until he himself came of age, and repudiated its being there. But the decision he referred to, *Ebbett's Case* (1), was arrived at under very different circumstances. The infant was not represented to be the purchaser by any one other than himself. The infant applied for shares, and when he came of age did not repudiate them.

Here a father goes to a broker, no matter where, and desires him to purchase shares for himself, at the same time saying, "I am *Frank William Richardson*; I *Frank William Richardson* pay you the money; I execute the deed, and I send it to the company in order to make sure that they have me, *Frank William Richardson*, to answer all the necessary obligations on my part." Then it turns out that *Frank William Richardson* has nothing whatever to do with the matter; and the man who buys the shares, who pays for them, and who executes the deed is heard to say that he is not liable, because he has used another name.

The thing scarcely bears statement; the name of the father must be put upon the list instead of that of the son; in other words, the summons must be granted, with costs.

Solicitors: Mr. *George Davis*; Messrs. *Phelps & Sidgwick*.

(1) Law Rep. 5 Ch. 302.

HODGKINSON *v.* CROWE.

V.-C. B.

1875

[1873 H. 124.]

Feb. 12, 13, 16.

Mining Lease—Usual and Customary Mining Clauses—Clause of Forfeiture on Bankruptcy.

A memorandum of agreement for a lease of coal mines in *North Staffordshire* provided that the lease was to have all usual and customary mining clauses:—

Held, that this provision did not entitle the lessor to the insertion in the lease of a clause of forfeiture thereof in the event of the lessee becoming bankrupt or compromising with his creditors for less than 20*s.* in the pound, or of a clause in restraint of assignment.

IN September, 1871, the Defendant *Crowe* agreed to take a lease of mines and minerals under an estate in *North Staffordshire* of which the Plaintiff was owner in fee simple. A memorandum of terms and conditions was signed by the Plaintiff and Defendant, and contained, amongst others, the following term: "The lease to have all usual and customary mining clauses." Considerable discussion took place in reference to the terms of the draft lease, and in particular as to the insertion of a clause of forfeiture in the event of the Defendant becoming bankrupt or compromising with his creditors for less than 20*s.* in the pound. The Plaintiff insisted upon, and the Defendant resisted, the insertion of this clause, as one "usual and customary" in all leases of mines granted in the northern division of *Stafford*. The Plaintiff also insisted upon the insertion of a clause in restraint of assignment without the licence of the lessor; and it appeared that although the Plaintiff had consented, as a condition for limiting the matter in dispute, to omit from the proposed lease such a clause, he now insisted, if a lease was settled in Court, upon his right to this clause as "usual and customary" within the northern division of *Staffordshire*.

Shortly after the execution of the memorandum the Defendant entered into possession of the property thereby agreed to be demised, and commenced and continued working and getting the minerals. In February, 1872, one *Jenkins* agreed to purchase the Defendant's interest in the property, with, as the Defendant alleged,

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the Plaintiff's consent; but this was altogether denied by the Plaintiff, who had written to the Defendant stating that as he had let the mines to him he should retain him as a tenant, and could not release him or recognise any one else as his tenant.

The bill was filed in 1873 for specific performance of the agreement of September, 1871, and the question was whether the Defendant could insist upon the omission from the lease of the covenant against assignment without license, and a clause of forfeiture on bankruptcy or composition with creditors.

Evidence was adduced by the Plaintiff that the clauses proposed to be inserted were usual and customary in mining leases in the northern division of *Staffordshire*.

Evidence on the other hand was adduced in support of the Defendant's contention that it was by no means usual now to insert a clause of forfeiture or one in restraint of alienation without license.

Mr. *Kay*, Q.C., and Mr. *Ince*, for the Plaintiff:—

A clause of forfeiture empowering the landlord to re-enter in the event of the tenant becoming bankrupt or compounding with his creditors for less than 20*s.* in the pound, and especially a clause against assigning or underletting without leave of the lessor in writing, are usual and customary clauses in mining leases and leases in general: *Bainbridge* on Mines (1); *Rogers* on Mines (2); *Haines* v. *Burnett* (3); and are shewn by the evidence to be usual and customary covenants of the neighbourhood in leases of mining properties. In determining the question the Court will have regard to the local usage: *Boardman* v. *Mostyn* (4); the evidence as to which is confirmed by the practice of conveyancers: *Davidson* on Conveyancing (5) (giving a covenant not to assign or underlet without previous license in writing in the precedent of a lease of mines in *Staffordshire*). Independently of local usage, it is an essential part of a mining lease that the lessor should have a voice, and the right of veto, with respect to the person to whom the lessee may propose to assign; and the same argument applies to the forfeiture clause, as in the absence of these provisions the lessor may have

(1) Page 249.
(2) Page 296.
(3) 1 L. T. (N.S.) 18; 27 Beav. 500.
(4) 6 Ves. 467.
(5) Vol. v. p. 371.

an improvident tenant forced upon him without his consent, and may be wholly unable to enforce his rights, having regard to the subject-matter of the contract.

Mr. *Jackson*, Q.C., and Mr. *Hamilton Humphreys*, for the Defendant, were not called on.

SIR JAMES BACON, V.C.:—

It is not possible, in my opinion, for the Plaintiff successfully to contend that he is entitled to have either of the two clauses mentioned inserted in the lease. The agreement for a lease of the mine is in writing; it is a special minute agreement which I must take to contain every provision between the parties to which their common consent was applied. The terms are described, the commencement is described, and the prices to be paid for the several materials to be worked in the mine are described, and the lease is to have all the usual and customary mining clauses. There is not a word about the custom of the county, not a word about the custom as to mining leases, but a special provision that the lease shall contain all the usual and customary mining clauses. It has been contended that to restrain a lessee from assigning is a usual mining clause. What has it to do with a mine? It is just as applicable to the lease of a house, a farm, or a public-house, or anything else that may be the subject of a lease. If there is to be a restriction upon the lessee against assigning that which he takes upon himself the burden of, it must be the subject of special stipulation between the parties. If, moreover, there is to be a stipulation that the lessor shall have a right of re-entry in the event of bankruptcy happening, that must be specially provided for; but that has nothing exclusively to do with mining. I have sometimes wondered that the policy of the law has not established some rule upon the subject; however there is none, and the only observation I have to make in reference to this case is, that it is not a mining clause. A dozen witnesses have been brought to prove what is usual in mining leases in this part of the country: usual, that is, if the parties agree to it, but not usual if one party, lessor or lessee, shall say as to any particular clause, "No, that is not my agreement. I have an agreement in writing in which I

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have specified every earthly thing by which I shall be bound in this lease; that is not in it, and I will not consent to it." What power is there to enforce it? What case is referred to? What instance is mentioned where there has been any endeavour to enforce the introduction of these two clauses, or either of them, against the consent of either party? It seems to me utterly impossible to suggest any. There is a written agreement, the specific performance of which is insisted upon by this bill; and the Plaintiff is entitled to a specific performance of that agreement, and to nothing more. He says there are terms not expressed in that agreement. The answer is, "I have not agreed to them; I am willing to be bound by everything I have agreed to, but I will not agree to what you want to put in, merely because you call it a mining clause." It is no more a mining clause than a tillage clause, or any other clause. A lessee has it in his power to agree or refuse to enter into certain special stipulations. In this case there is not a particle of evidence, nor a single fact mentioned, from which I should be at liberty to infer that the parties when they negotiated for this lease contemplated anything, or agreed to anything, that was not written in plain terms in the agreement. I am of opinion, therefore, that the Plaintiff cannot insist upon anything, beyond the stipulations which the agreement contains, being inserted in the lease, including therein all the customary covenants and provisions applicable to mining operations. To that extent he is entitled. No doubt, as has been observed in argument, there are many special provisions, such as the manner and time of working, protection against the influx of water, &c., all of which are customary in mining leases, to every one of which the Plaintiff is entitled from his lessee. But that he should have a covenant from him that he will not part with a thing which he has bought or paid for, and that if he becomes bankrupt his creditors shall be excluded from all the value that he might have added to the thing demised to him, would, in my opinion, be wholly unjustifiable, and directly at variance with the deliberate agreement between these parties.

Solicitors: Mr. *E. Doyle*, agent for Messrs. *Paddock & Sons, Hanley;* Mr. *Tibbits*, agent for Mr. *Heaton, Burslem.*

PRYOR *v.* PRYOR.

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1875
Feb. 18.

[1864 P. 78.]

Partition Act, 1868—*Jurisdiction—Sale—Retrospective Operation.*

The *Partition Act*, 1868, s. 4, though retrospective in its operation, does not enable the Court to direct a sale under a decree for partition made before the Act, but not carried into operation at the time of passing the Act.

The usual decree was made in a partition suit in 1864, with liberty for any of the parties before the commission should be issued "to carry in proposals for a sale or for a partition before the Judge in Chambers":—

Held, that although a commission had never been issued, the Court had no jurisdiction, without the consent of all parties interested, now to direct a sale instead of a partition.

Affirmed by L.J. L.R. 10 Ch. 469.

THE object of this application was to stay all proceedings on the proposal of the Defendants, *Felix Pryor* and *Arthur Pryor*, carried into Chambers, for a sale of an estate under the decree of the 25th of July, 1864, on the ground that this Court had no power, in the absence of consent by the applicants, to order any such sale under the decree.

In May, 1864, the suit of *Pryor* v. *Pryor* [1864 P. 78] was instituted to obtain the partition of an estate at *Lambeth*, in which the Plaintiff, *Thomas Pryor*, and the Defendants were interested in sevenths. The usual partition decree was made on the 25th of July, 1864, with the following addition: "And any of the parties are to be at liberty, before the commission shall be issued, to carry in proposals for a sale or for a partition of the said hereditaments before the Judge in Chambers.

Various proceedings had taken place in the suit, but a commission was not issued. Changes and transmissions of interest took place, and Messrs. *Maudslay, Sons, & Field* (whose works at *Lambeth* formed part of the property) acquired by purchase three seventh shares. In 1873 a supplemental bill was filed by *Arthur Pryor*, who had succeeded to the interest of *Thomas Pryor* (*Pryor* v. *Pryor* [1873 P. 100]), praying a declaration that he was entitled to stand in the place of *Thomas Pryor*, and to have the benefit of the former suit, &c.; and that the decree in that suit

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might be carried into execution, and that the hereditaments at *Lambeth* might be partitioned between the Plaintiff and the other parties interested, &c.; or that the said hereditaments might be sold and the proceeds distributed between or among the parties interested.

The applicants, Messrs. *Maudslay*, objected to a sale, and submitted (independently of the question of jurisdiction) that a partition was the best and proper way of dealing with the property, having regard to the interests of all the co-owners thereof.

Proceedings took place in Chambers on behalf of *Arthur* and *Felix Pryor*, for the purpose of obtaining a direction for sale of the property; and the question whether the Court had jurisdiction compulsorily to direct a sale was now raised by adjourned summons taken out by Messrs. *Maudslay* on the 19th of December, 1874, that they "not consenting to any sale of the *Lambeth* estate under the decree of the 25th of July, 1864, and this Court having no jurisdiction in the absence of such consent to order any such sale under the said decree, all proceedings on the proposal of the said Defendants, *F. Pryor* and *Arthur Pryor*, carried into Chambers on the 21st of May, 1874, for the sale of the said estate, and on the summons to proceed thereunder, may be stayed; and that the costs of this application may be paid by the Defendants, *F. Pryor* and *A. Pryor*."

Mr. *Kay*, Q.C., and Mr. *Whitehorne*, for Messrs. *Maudslay*:—

The Court has no power in the face of the decree for partition made in 1864, at a time when a sale could not be compulsorily directed, now to direct a sale unless with the consent of all parties. The *Partition Act*, 1868, cannot affect or vary the operation of a decree for partition actually made before the Act came into operation. In *Lys* v. *Lys* (1), which is cited as an authority for the retrospective operation of the Act, no decree had been made, and therefore it was a suit in which, "if the Act had not been passed, a decree for partition might have been made," sect. 4. We oppose a sale as being opposed to the interest of the persons entitled to the property; and in the face of such opposition the Court has no jurisdiction to compel a sale.

(1) Law Rep. 7 Eq. 126.

Mr. *Jackson*, Q.C., and Mr. *E. James*, for incumbrancers, who also objected to a sale.

Mr. *Eddis*, Q.C., and Mr. *Macnaghten*, for the Defendants, *F.* and *A. Pryor*:—

The *Partition Act* is a remedial statute for the purpose of giving facilities not previously possessed by the Court of dealing with properties; and it has been expressly decided in *Lys* v. *Lys* (1) to be retrospective in operation, and to apply to suits instituted before the Act, in which a decree for partition might have been made. By the liberty given to carry in proposals a sale was distinctly contemplated in the decree, which was not final until further consideration upon the return of the commission; and as no commission has yet been issued, we submit that by the decree giving liberty to carry in proposals for a sale, supplemented by the operation of the *Partition Act*, sect. 4, the Court has clear jurisdiction now to direct a sale at the request of the majority of the persons interested.

SIR JAMES BACON, V.C.:—

I cannot read the decree or elicit from it any meaning except that which it properly bears. The decree is right enough. It inquires into the nature of the property and into all the interests which may exist in that property. Then it gives to any one of the parties liberty to make a proposal for a sale; that is to say, if it is ascertained properly who are interested, and one proposes, and the others do not dissent, then a sale may take place, and the property will be dealt with according to their own consent. That is the way in which I read the decree, in which I do not see anything improper, or any excess of power, although it was made before the *Partition Act* passed. [His Honour, after observing upon the form of the two summonses pending before the Court, proceeded:—]

As the case stood when this decree was made, there was no power to decree a sale. There was a sale asked for, no doubt, at the instance of some of the parties; and if, upon further consideration, they should all agree that a sale was the most bene-

(1) Law Rep. 7 Eq. 126.

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ficial way of disposing of their interests, the Court would not withhold its assent to that, and that is all the decree means. It gives no power, and the Court possesses no power, to direct a sale against anybody's will. That is all the decree means, as I read it. I think, therefore, that the Act having been since passed, I need only make this observation upon it, that the words of the Act—"any suit in which a partition might be made"—mean only any partition suit. The expression might have been more concise, but I think that is the meaning of it beyond all question. The Court has discretion given by the earlier section of the Act in any partition suit. This was a suit which was over and done with and gone before the Act of Parliament was passed. In my opinion, therefore, against the will of the parties interested, there can be no sale, or anything but a partition. In point of form I cannot prohibit—unless they are content to take what I say now—the Plaintiffs from carrying in proposals for a sale, any more than I can prohibit the Defendant from saying the Court has no jurisdiction to make a sale. The decree which is pronounced does not countenance any such jurisdiction, or give any such power. Partition alone can be the result of this decree.

Solicitors: Messrs. *W. & J. Gibson;* Messrs. *Parker, Watney, & Clarke.*

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1875

Jan. 21, 26.

[1875 G. 1.]

Partnership Agreement—Arbitration Clause—Suit for Accounts—Common Law Procedure Act, 1854, *s.* 11.

Articles for a partnership for one year contained an arbitration clause. The partnership was continued beyond the year and ultimately dissolved :—

Held, that the arbitration clause was in force, and proceedings in a suit for accounts by one of the partners against the other stayed under sect. 11 of the *Common Law Procedure Act*, 1854.

THE Defendant was a widow carrying on business as a miller at *Sturry*, in *Kent;* and the Plaintiff, on the 6th of July, 1869, entered into partnership with her. The partnership articles provided that the term of occupation of the *Sturry Mills* by the Plaintiff, and the partnership, should be for one year from the above date, and that the Defendant should carry on the business under her name, and receive a certain sum as rent for the mills; and, after stating the amount of capital which the partnership should consist of; certain things that were to be done by the partners; and the shares of the profits which they were to receive, the articles provided (clause 15) that "within one calendar month after the expiration of the partnership a full and general account in writing should be taken" of the stock, debts, and liabilities, "and a just valuation should be made of all the particulars included in such account" which required and were capable of valuation; and that, after making provision for the payment of the debts, there should be a division in equal shares of what belonged to the partnership; and that (clause 16), "If any doubt, difference, or dispute should arise between the parties hereto, or their respective executors or administrators, touching these presents, or the construction thereof, or any clause or thing herein contained, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, or liabilities of either party in connection with the premises, or whenever any valuation shall be required, the matter in difference or valuation shall be referred to two arbitrators, or their umpire, pursuant to, and so as with regard

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to, the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in the *Common Law Procedure Act*, 1854, or any then subsisting statutory modification thereof." The business of the partnership, was, in fact, carried on from the 28th of June, 1869; and the partnership was continued by parol and at will from the 6th of July, 1870, to the 31st of December, 1873, when the partnership was, on the proposition of the Defendant, assented to by the Plaintiff, ended. Questions soon afterwards arose in reference to an adjustment of the accounts and the respective interests of the partners under clause 15 of the articles, and on the 21st of February, 1874, the Defendant gave notice to the Plaintiff that she had appointed the gentleman named (a member of the Equity Bar) to be her arbitrator under the *Common Law Procedure Act*, 1854, for the purpose of a valuation, and with respect to any differences which might arise touching the articles of the co-partnership, and the construction thereof, and as to the accounts and dealings of the partnership, and as to their respective rights, duties, and liabilities in connection with the partnership; and she required the Plaintiff, within seven clear days from the service of the notice, to appoint an arbitrator on his behalf.

On the 5th of March, 1874, in consequence of letters passing between the Plaintiff and the Defendant, in which the former stated that he was anxious to agree with the latter in any steps that might be necessary for a proper adjustment of the accounts, which had been rendered to her up to the close of their partnership, that he was unconscious that she found any objection to any portion of them, and that, under the circumstances, he could not recognise the propriety of appointing an arbitrator, the Defendant's solicitors informed him in writing that, on consideration, it had been determined that the notice of the 21st of February would not be acted on, but that the Defendant was desirous that arbitrators should be appointed for the purpose of ascertaining the relative positions and rights of each partner on winding up the partnership, and to determine what sum of money (if any) should be paid to the Defendant in respect of her interest therein at the dissolution of the partnership.

On the 15th of April, 1874, the counsel so appointed as arbi-

trator made in duplicate a written report with schedules annexed, and the report and schedules, which were sent on the 21st of April, 1874, to the Plaintiff, filled twenty-two brief sheets, and were in form and detail like the certificate which a Chief Clerk of a Vice-Chancellor would make under a decree for winding up the affairs of a partnership. The report and schedules shewed that in the view of such counsel a sum of £2779 14*s.* 11*d.* was owing to the Defendant by the Plaintiff. It was alleged by the Plaintiff that it was in opposition to certain clauses of the articles of partnership that the counsel or arbitrator had arrived at that conclusion, and he objected to the way in which the accounts had been made out, but he paid the Defendant £2000, and alleged that only about £20 was then owing.

On the 29th of July, 1874, the Defendant's solicitors stated that she adhered to the whole of the accounts and figures so prepared. From the 5th of March, 1874, down to the 8th of December, 1874, no step was taken by the Defendant for arbitration under the *Common Law Procedure Act,* 1854; but on the latter date she gave the Plaintiff notice that, pursuant to the provisions contained in the articles of partnership of the 6th of July, 1869, she had appointed another gentleman, named, to be "an arbitrator, to whom all matters in difference between us relating to the said partnership shall be referred," and that she required the Plaintiff to make an appointment of an arbitrator within seven days from that date. The Plaintiff did not appoint an arbitrator, because it appeared to him that the object of the Defendant in giving the notice was to obtain from the arbitrators an award under the Act of 1854 similar in character to the report and schedules of the 15th of April, 1874, which the Plaintiff was advised to be beyond their competency.

On the 18th of December, 1874, the Defendant gave the Plaintiff notice that, as he had not, within the time limited, appointed an arbitrator, she had appointed the gentleman referred to above to act as sole arbitrator, to whom all matters in difference between them relating to the partnership should be referred; and such arbitrator, on the 22nd of December, gave notice to both parties that he would proceed with the reference on the days named by him. On the 23rd of December, 1874, an order was made by

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Mr. Baron *Pigott* in the matter of the arbitration, on an *ex parte* application of the Defendant, by which he commanded the Plaintiff to attend before the arbitrator and submit to be examined on behalf of the Defendant touching the matters in difference. On the 29th of December, 1874, notice was given by the Plaintiff's solicitor to the Defendant's solicitors that a bill in Chancery would, with all dispatch, be filed for winding up the affairs of the partnership, to restrain the proceedings under the Act of 1854, and for a receiver, and requesting that the arbitration should not be proceeded with. The reply on the following day was that the request could not be acceded to; that the Plaintiff had been, since March, aware of the Defendant's intention to submit the disputes to arbitration; that the disputes were reduced to a few matters, which could be disposed of by the arbitrator in two sittings; and that a suit to take the whole accounts would be a most wanton act. The Plaintiff's solicitors took out a summons in the matter of the arbitration, requiring the Defendant to shew cause why the proceedings should not be stayed until over the first day in Hilary Term, 1875, and in consequence of the service of the summons upon the arbitrator, he postponed the proceedings in the reference for a week. The summons was heard before Mr. Justice *Archibald* on the 4th of January, and dismissed with costs. This bill was filed on the 6th of January, 1875; and the Plaintiff, after alleging that the Defendant intended forthwith to obtain from the arbitrator his award, unless restrained from so doing, and submitting that, under the circumstances, he was entitled to the relief prayed; that the arbitrator, under the Act of 1854, was incompetent to give such relief, and that it could be obtained in this Court alone, prayed for a declaration that the arbitration clause (16) had no operation or effect on or after the 6th of July, 1870, or, if the Court should not be of that opinion, then for a declaration that the Defendant's submission to arbitration under the Act of 1854 of all matters in difference relating to the partnership made by the notice of the 8th of December was not one authorized by the arbitration clause (16), and was of no effect; for a declaration in reference to the debts of the Defendant (not material to be further mentioned); for accounts; the appointment of a receiver; for an injunction to restrain the Defendant

from further proceedings against the Plaintiff under the provisions of the Act of 1854; and for costs in this cause and in the arbitration.

On the 7th of January the Plaintiff gave notice of a motion for the 11th of January for an injunction in the terms of the prayer in that respect; and on the 14th of January the Defendant gave notice of a motion for the 21st of January that all further proceedings in the suit might be stayed pursuant to the provisions of the 17th and 18th Vict. c. 125, sect. 11, and that the Plaintiff might be ordered to pay the costs thereof, including the costs of this application.

Mr. *Mackeson*, Q.C., and Mr. *Millar*, for the Defendant:—

The points now in dispute in reference to the accounts are very few; in fact, only three. They are definite, and clearly within the words and spirit of the *Common Law Procedure Act*. The parties continued in partnership upon substantially the same terms as defined by the articles of partnership, and therefore the arbitration clause can be carried into execution. A mere prayer for a receiver will not prevent the Court from permitting the arbitrator to proceed with the reference.

[They referred to *Plews* v. *Baker* (1), *Willesford* v. *Watson* (2), *Hirsch* v. *Im Thurn* (3), *Seligmann* v. *Le Boutillier* (4), *In re Lord* (5), *Newton* v. *Taylor* (6).]

Mr. *Dickinson*, Q.C., and Mr. *L. Bird*, for the Plaintiff:—

The original term of partnership expired at the end of one year, and there was no written agreement to refer to arbitration after that time. The business was subsequently carried on upon a verbal arrangement, and the case made by the bill relates to differences which arose in reference to the realization of the estate and the payment of debts after the partnership under the articles had come to an end; therefore it is clear that the relief prayed cannot be given under the arbitration. The arbitrator has not the administrative machinery which the Court possesses for taking

(1) Law Rep. 16 Eq. 564.
(2) Law Rep. 8 Ch. 473.
(3) 4 Jur. (N.S.) 587.
(4) Law Rep. 1 C. P. 681.
(5) 1 K. & J. 90.
(6) Law Rep. 19 Eq. 14.

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accounts and winding up partnerships, nor can the arbitrator appoint a receiver, or grant an injunction, both of which are prayed for.

[They cited *Cook* v. *Catchpole* (1).]

Mr. *Mackeson*, in reply.

SIR CHARLES HALL, V.C.:—

The question which I have to determine in this case is, whether I should comply with the Defendant's application to stay all the proceedings in this suit, that application being made under the 11th section of the *Common Law Procedure Act*. The Courts have considered that the jurisdiction should be exercised if the Court be satisfied that no sufficient reason exists why the matters cannot or ought not to be referred to arbitration according to the agreement, and, as stated by Lord *Selborne* in *Willesford* v. *Watson* (2), a *primâ facie* duty is cast upon the Court to act upon the agreement. The Court is not to act unless the Defendant was, at the time of the commencement of the proceedings, ready and willing to join and concur in all acts necessary and proper for causing the matters to be decided by arbitration—as to which requisite for the Court's acting no question arises in the present case.

The Plaintiff and Defendant entered into partnership in the year 1869. The partnership was for one year. The partnership contract was contained in partnership articles, dated the 6th of July, 1869, and they contained provisions for taking a partnership account at the end of the first half year of the partnership and for taking an account and dividing the assets at the expiration of the partnership. The articles also contained an arbitration clause. [The Vice-Chancellor read clause 16, set forth above.] The partnership, although originally for one year only, was continued for several years; the partnership articles regulating the prolonged partnership, except in so far as they were, during the year, varied by the parties. The 16th clause of the partnership articles remained applicable to, and formed part of the partnership contract, as well before as after the one year. This has not been questioned—indeed, the Plaintiff's solicitor, in a letter to the Defendant's solicitors

(1) 34 L. J. (Ch.) 60. (2) Law Rep. 8 Ch. 473.

10 Jun. R.S. 1868

stated that the Plaintiff was quite prepared to abide by the 16th clause in case of necessity. It has, however, been contended before me that after the one year there was not a deed in writing, containing an agreement to refer to arbitration differences between the parties after the one year; and therefore that sect. 11 of the *Common Law Procedure Act* is not applicable to the case.

I am of opinion that this contention is without foundation. When the parties prolonged their partnership on the old terms, they adopted, as I consider, the 16th clause of the partnership contract, and always with it the statutory provision, that whoever of them might be Defendant in an action or suit brought or commenced by the other, might apply under the 11th section of the Act. The Plaintiff has contended that the 16th clause is inapplicable to the circumstances of the present case—that what the Defendant is seeking to effect by the reference mentioned in the bill is not within the 16th clause. It appears to me that that contention is incorrect. The 16th clause is very comprehensive in its terms. It is clearly not confined to the duration of the partnership, because it provides for differences between the respective executors or administrators of the parties, and it applies whenever a valuation should be required; and the 15th clause of the partnership articles provides for a valuation for the purpose of making a division of the assets upon the expiration of the partnership. The 16th clause applies to differences not only as to the construction of the partnership deed, but to any matter connected with that deed, and the operation thereof and the rights, duties, or liabilities of either party in connection with the premises. As I construe that clause, it includes every difference which might arise between the parties on winding up the partnership—the winding-up being provided for by the 15th clause. It was, however, contended that there were questions between the parties which require declarations to be made by this Court, but the matters which it is said necessitate such declarations are matters which the parties have, as I read the clause, agreed should be referred. They have agreed that differences as to the construction of the deed should be referred, and the arbitrator must, I apprehend, as was said in *Willesford* v. *Watson* (1), enter into the whole matter, construe the

(1) Law Rep. 8 Ch. 473.

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instrument, and decide whether the thing complained of is inside or outside the agreement. The Court will not limit the arbitrator's power to those things which are determined by the Court to be within the agreement, nor is it a reason for the Court not making an order that the differences between the parties include the consideration of collateral matters affecting the original partnership contract. This was urged unsuccessfully in *Willesford* v. *Watson* (1). The reference to the arbitrator is in terms a reference of all matters in difference. The Defendant says the matters which the arbitrator will have to consider are very few—in fact, reduced to three; but the Plaintiff disputes that, and says that the reference will, or may, embrace all that would be included in a decree to take a partnership account. My impression is that the real differences between the parties are limited; but, at all events, I see no reason to doubt that they will all be satisfactorily dealt with by the arbitrator, and I am satisfied that no sufficient reason exists why the matters cannot or ought not to be referred to arbitration. The bill prays for the appointment of a receiver, but no motion for a receiver has been made, and I do not think any is likely to be made; moreover, the Defendant by his counsel offered to consent to such appointment if the Plaintiff desired to have a receiver. Should circumstances arise rendering the appointment of a receiver proper, the Court will be able to appoint one. In *Willesford* v. *Watson*, the inability of the arbitrator to grant an injunction was not considered a sufficient reason for not making an order to stay proceedings.

Solicitors: Messrs. *Jones, Blaxland, & Son;* Mr. *J. Aldridge.*

(1) Law Rep. 8 Ch. 473.

LORD TREDEGAR *v.* WINDUS.

V.-C. H.
1875
Feb. 24.

[1875 T. 11.]

Practice—Jurisdiction—Res Judicata—Injunction—Suit in Equity—Action at Law in reference to same Subject-matter.

A Plaintiff in equity filed his bill stating that a policy had become void at law, and claiming to have it treated as valid in equity.

After bill dismissed the same Plaintiff sued at law on the policy:—

Held, that a bill would lie to restrain the action, and injunction granted accordingly.

THIS was a motion on behalf of the Plaintiffs, the trustees of the *Equitable Assurance Society*, for an injunction to restrain an action brought against them as such trustees in the names of the Defendants, the executors of the late *Thomas Windus*, to recover a sum alleged to be due to them under an assurance effected by him with the society for £5000 payable on his death to his legal personal representatives. The society was one for granting policies of life assurance, and was governed by a deed of settlement dated the 7th of September, 1762. By the 67th clause it was provided that if any premium of assurance should be unpaid for the space of thirty days after the time stipulated for payment the policy should be void, and such default of payment should be a forfeiture of all claim upon the society by the person assured, his executors, administrators, or assigns; but if the persons who should have made such default of payment should within three calendar months after the day of payment pay or cause to be paid to the society the premium so behind, together with the additional sum of 10*s.* upon every £100 assured, then such policy should revive and continue in force and be valid to all intents and purposes.

On the 3rd of September, 1812, *Thomas Windus* effected an assurance on his life with the society for £5000, and by the policy two of the trustees of the society covenanted with him to pay to his executors out of the stock or fund of the society that sum. The annual premium was £146 1*s.*

Thomas Windus paid the annual premium on the policy until

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the year 1815 inclusive. In the year 1816 he did not pay the premium either on the appointed day or within the thirty days of grace allowed, nor did he revive his policy within the three months prescribed for that purpose by the deed of settlement. The society on the 9th of January, 1817, granted to him a new policy of assurance on his life for £5000, and the premium fixed by the new policy was the same as that payable under the former policy.

The new policy was effected on a proposal in the form in ordinary use at that time by the society, and on reference in the usual way to a friend and a medical attendant, and a declaration by *Thomas Windus* as to his age, state of health, and other circumstances, and he paid an entrance fee of £12 10*s*.

Thomas Windus paid the premiums on the new policy until his death, which took place on the 13th of December, 1854. The executors — the Defendants — proved his will on the 26th of January, 1855. On the 11th of April, 1855, the society paid to them the sum of £8300, being the sum of £5000 assured by the policy of the 9th of January, 1817, and £3300 the additions made thereto according to the bye-laws of the society, and for this sum they signed a receipt indorsed on that policy. On the 13th of November, 1860, *Ansley Windus*, a son and one of the executors of *Thomas Windus*, filed a bill in this Court against the trustees of the society and against his two co-executors, as they were unwilling to join him as co-Plaintiffs, and by it prayed for a declaration that he and his co-executors ought to be restored to and placed in the same situation as if the policy of the 3rd day of September, 1812, had been revived and had continued in force until after the death of *Thomas Windus*, or as if the policy of the 9th day of January, 1817, had been dated as on the 3rd day of September, 1812, and to be entitled to all past additions, dividends, bonuses, profits, and allowances accordingly; for an account of what was due to them as such executors in respect of the policy, and the sum assured and the additions, dividends, bonuses, profits and allowances, the Plaintiff being willing and thereby offering to allow for the sum of £8300 paid to the executors, and the difference, if any, to the society between the premiums in respect of the policy of the 9th day of January, 1817, and the

premiums which would have been paid in respect of the policy of the 3rd day of September, 1812, in case the same had been revived and continued, and that what upon taking such accounts should be found due to the Plaintiff and his co-executors might be paid to them out of the funds of the society; or in case the Plaintiff should not, in the opinion of the Court, be entitled to the relief thereinbefore prayed, then, if it should appear that the policy of the 9th day of January, 1817, was not a valid policy, for an account of the premiums paid by *Thomas Windus* in his lifetime upon or in respect of the same policy, together with the interest thereon, and that the amount of such premiums and interest might be ascertained, and that the excess of such amount over the aforesaid sum of £8300 might be paid to the Plaintiff and his co-executors out of the funds of the society. The relief so sought was founded on statements in the bill setting forth the by-laws of the society in force in September, 1812, and alleging that by reason of his change of residence *Thomas Windus* did not receive the usual notice from the society reminding him of the time within which the premium on the policy in the year 1816 ought to be paid; that he had therefore omitted to pay it; that he had been induced by representations made to him by the actuary not to revive the policy in the manner provided by the 67th clause; and that the policy of January, 1817, was granted to him in pursuance of a promise that a new policy should be granted to him upon the same terms as the late one, and that he believed that such policy would be subject to the conditions not differing from those to which the late policy was subject.

It appeared that by reason of a certain bye-law of the society which affected policies of assurance granted after the 31st of September, 1816, the policy of January, 1817, did not become entitled to divers bonuses and additions which were attached to policies of an earlier date; also that *Thomas Windus*, in the year 1840, protested against the operation of that bye-law so far as concerned his policy of January, 1817, but the directors of the society did not think fit, and in truth did not consider themselves bound to make any concession to him on that account. *Thomas Windus* did not discover the difference between his policy of 1817 and the one of 1812 until the year 1839.

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The case of the Plaintiff *Ansley Windus* was that the policy of 1812 became void, that the executors had no remedy except in a Court of Equity, and that under the circumstances they were entitled to be treated in a Court of Equity as if that policy had continued to exist, and to have paid to them the difference between what they had received and what would have been payable under the policy of 1812.

That cause came on to be heard before the Master of the Rolls, and on the 13th of May, 1862, the bill was dismissed, but without costs, the trustees of the society not asking for them. *Ansley Windus* appealed from the order of dismissal, and the appeal, which was heard by the Lords Justices on the 18th of December, 1863, was dismissed with costs as regarded the trustees of the society. *Ansley Windus* further appealed to the House of Lords, and on the 10th of July, 1866, that appeal was also dismissed with costs.

On the 27th of July, 1866, *Ansley Windus* presented to the Appeal Committee of the House of Lords a petition for a re-hearing of his appeal, but it was refused. Nothing further was done until the 19th of November, 1874, when *Ansley Windus,* jointly with his co-executors, commenced the action now sought to be restrained. It was not disputed that in the action the Plaintiffs were suing upon the policy of 1812, and seeking to recover the amount which would have been properly payable thereon had that policy been kept on foot.

The Plaintiffs in the action delivered a declaration, consisting of twelve counts, which was set forth in the bill, but it is sufficiently referred to in the judgment. The Plaintiffs claimed £20,000 damages.

Mr. *Dickinson,* Q.C., and Mr. *Kekewich,* for the motion, submitted that this was an attempt, in 1875, to litigate at law the same subject-matter which was in litigation in the suit instituted in 1860, and fully disposed of by the House of Lords in 1866. The Plaintiffs in the action seemed to consider that they had in their possession, and could produce, evidence which was refused in the suit; but there was in truth no ground for the belief that they had any new materials or any new evidence at all. The authorities

clearly shewed that in such a case as this—the whole matter having been adjudicated upon in this Court—the parties could not, the claim being the same as in the suit, proceed at law; and that if they did so, this Court would interfere by injunction.

[They referred to *Story* on Equity Jurisprudence (1), *Collins* v. *Cave* (2), *Booth* v. *Leycester* (3), *Beere* v. *Fleming* (4), and *Mollett* v. *Enequist* (5).]

Mr. *Lindley*, Q.C., Mr. *Humphry*, and Mr. *T. R. Bennett*, for the Defendants, said it appeared that this Court dismissed the bill of 1860 because the Plaintiff did not shew any equity to sustain it, and submitted that even if that was so, the same party who it was alleged could not shew any equity upon the face of his bill, was entitled to bring his action at law, he having, or alleging that he had, legal rights. It was at one time imagined that the policy of 1812 was forfeited; still the Plaintiff in the suit of 1860 considered that, notwithstanding, there were grounds for equitable relief, and on that footing he presented his case to the Court; but in the action the Plaintiffs shewed that that policy was never forfeited at all; but, whether really forfeited or not, persons could bring an action upon a policy which they thought had been forfeited. The Defendants' legal rights had never been adjudicated upon, and that being so, why should they not be allowed to proceed with their action? This Court had not in the suit had its attention directed to the Defendants' legal rights, as distinguished from what were imagined to be their equitable rights. The issues in the action were different to those in the suit. The motion was founded upon an error in point of principle, the authorities cited not supporting it, and that being so, the Court ought to refuse the injunction asked for. They referred to *Langmead* v. *Maple* (6), *Kemp* v. *Tucker* (7), *Hoare* v. *Bremridge* (8), *Wodehouse* v. *Farebrother* (9), and *Tatham* v. *Wright* (10).

(1) 10th Ed. vol. ii. p. 76, ss. 88, 889.
(2) 27 L. J. (Ex.) 146.
(3) 1 Keen, 579; S. C. on appeal, 3 My. & Cr. 459.
(4) 13 Ir. Com. Law Rep. 506.
(5) 25 Beav. 609.
(6) 18 C. B. (N.S.) 255.
(7) Law Rep. 8 Ch. 369.
(8) Ibid. 22.
(9) 5 E. & B. 277.
(10) 2 Russ. & My. 1; 7 A. & E. 313, 330; 5 Cl. & F. 670.

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SIR CHARLES HALL, V.C., after stating all the facts, continued:—

The declaration in the action is somewhat vague as to which of the two policies is meant to be described therein; but it was alleged by the counsel for the Plaintiffs in the action, and the arguments before me proceeded upon the view that the policy of September, 1812, is the one mentioned in each of the two counts. Indeed, an affidavit of *Ansley Windus*, filed in opposition to the motion, states expressly that the action was commenced to recover a sum due on that policy. The Plaintiffs in the present suit say that the action should be restrained, it being for the same subject-matter as was the subject of the former suit. In reference to this, I have read the pleadings in the former suit, and the judgments of the Master of the Rolls, the Lords Justices, and the Law Lords, and I have come to the conclusion that the Defendants are attempting again to litigate with the Plaintiffs the matter which was in controversy in the former suit. In that suit the Plaintiff alleged that the policy of 1812 was void and incapable of being sued upon, and he shaped his bill, and the Court entertained his suit upon that view; for the Master of the Rolls in his judgment said the policy of 1812 was absolutely forfeited on the 3rd of December, 1816. The Defendants now say that the Plaintiff in the former suit entirely mistook his case, that he had a legal remedy, that a Court of Law should have been resorted to, and that the Defendants ought not to be restrained from continuing their action. Will the Court allow such a course to be taken—*i.e.*, allow a suitor to take his chance of obtaining relief, alleging an instrument to be invalid, but that nevertheless, for stated reasons, it should be treated in this Court as valid, although a Court of Law could not so regard it, and having had his case gone into upon the merits, and adjudicated upon, to ignore all the proceedings so had, and to take proceedings at law on the instrument, alleging it to be valid, his object in such proceedings being to obtain the relief he unsuccessfully sought in equity?—I apprehend not. When a Plaintiff comes into equity in such a case, he submits, as I consider, his whole case to the jurisdiction of the Court he so applies to. In *Phelps* v. *Prothero* (1), in which case the Defendant

(1) 7 D. M. & G. 722. 2 Jur. N.S. 173.

obtained a decree, and afterwards brought an action, Lord Justice *Turner* said (1): "The first question is whether the Defendant was at all entitled to commence the action now sought to be restrained. I am of opinion that he was not. The Defendant had originally the right to proceed, either at law for breach of the agreement, or in this Court for the specific performance of it. He adopted the latter remedy. I think that a Plaintiff who has legal rights, and comes to this Court for its aid, is bound to put his legal rights under the control of the Court, and that that principle reaches the present case. The Plaintiff, therefore, having sued in equity for specific performance, was bound, in my opinion, to submit his claim for damages to the judgment of this Court and was not entitled to proceed at law otherwise than by leave of this Court." The Lord Justice *Knight Bruce* stated that he gave no opinion as to how the matter would have stood had the Plaintiff failed, but held that this Court had jurisdiction to stay the action.

The Plaintiff in the former suit, *Ansley Windus*, having selected his tribunal, and the case having been adjudicated upon on the merits, he can only bring it forward again by a bill of review (which in a case like the present could only be filed with the leave of the Court). A plea of the former suit would have been a good defence to a new bill not being a bill of review, as to which I may refer to what was said by Lord *Hardwicke*, in *Brandlyn* v. *Ord* (2), and to *Peterborough* v. *Germaine* (3), and to Lord *Cranworth's* observations in *Moss* v. *Anglo-Egyptian Navigation Company* (4).

The Defendants insisted that there was nothing to take away their legal right, and in support of this contention reference was made to cases in which issues had been directed to try the validity of alleged wills of real estate, and afterwards ejectments had been brought, of which cases the case of *Tatham* v. *Wright* (5) was an example; but cases as to land, the title to which is ordinarily tried in ejectment (the Plaintiff at law ordinarily being able to bring more than one ejectment), are not authorities in reference to other cases, as to which I may refer to the observations of Lord *Cran-*

(1) 7 D. M. & G. 733.
(2) 1 Atk. 571.
(3) 6 Bro. P. C. 1.
(4) Law Rep. 1 Ch. 108, 115, 116.
(5) 2 Russ. & My. 1; 7 A. & E. 313; 5 Cl. & F. 670.

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worth in *Boyse* v. *Rossborough* (1). I was referred to the case of *Beere* v. *Fleming* (2), but the circumstances of that case are altogether different to those of the present. The right claimed was substantially different to that which had been adjudicated upon before; and the general observations of Baron *Fitzgerald* are by no means unfavourable to the exercise of the jurisdiction to stay proceedings in a case in which, in a former suit, the merits have been gone into and adjudicated upon, and substantially the same question is afterwards brought forward in another proceeding. In that case his Lordship said (3): "I apprehend it is not correct to say that a party, seeking equitable relief in respect of an instrument on which he can sue at law, and whose bill is dismissed, though without stating such dismissal to be without prejudice, is necessarily subject to be restrained from proceeding at law on the same instrument. In the case of bills for the specific performance of agreements, though the bill be dismissed without any saving of the Plaintiff's right to proceed at law, I believe it to be well settled that the Plaintiff may proceed at law; and that, if the defendant would restrain him, he must shew, by bill, some substantive equity for the purpose. In this case the Court of Chancery, in truth, appears to have passed no judgment of its own, but to have dismissed *Taaffe's* suit simply on the ground of his failure to establish his right at law, in an action or actions, which could not, without the aid of a Court of Equity, have conclusively established the right. The decree in the cross cause contains no declaration of right, except as to the soil, not now in question, and no proviso restraining *Taaffe* from further proceeding at law. I see nothing, therefore, to warrant us in holding that the decree would constitute of itself, or with the judgments at law, an equitable bar to this action." He then refers to the case of *Tatham* v. *Wright* (4).

It was contended, on behalf of the Defendants, that if the Plaintiffs were right they had a good defence at law to the action, and that the case of *Langmead* v. *Maple* (5) was an authority for this. I am, however, of opinion that if this be so there is never-

(1) 6 H. L. C. 43.
(2) 13 Ir. Com. Law Rep. 506.
(3) Ibid. 513.
(4) 2 Russ. & My. 1; 7 A. & E. 313; 5 Cl. & F. 670.
(5) 18 C. B. (N.S.) 255.

theless jurisdiction in this Court to stay the action, and that it is convenient and desirable that such jurisdiction should be exercised. No doubt ordinarily this Court, where there is a legal defence, does not interfere, but this is, I consider, inapplicable to a case in which the Court has already exercised jurisdiction. In such a case the Court, by reason of having exercised jurisdiction, is more able than the new Court appealed to to consider and determine whether or not the matter, the subject of the new proceedings, was or was not dealt with in the former proceeding, and if so, how? In *Phelps* v. *Prothero* (1), although former proceedings were pleaded (by way of equitable plea) at law, the plea was held bad, and the Defendant at law had to file a bill in equity. I am apprehensive that such might be the result of pleading at law in the present case (whether the plea were a legal or an equitable plea).

It was said that in cases of specific performance the unsuccessful party in equity may proceed at law. This, no doubt, is so in certain cases, but this is only when the Plaintiffs so doing is not inconsistent with, and does not raise the same question as has been already dealt with by the Court of Equity: *Reynolds* v. *Nelson* (2); *M'Namara* v. *Arthur* (3).

If, in the present case, the Defendants had brought the action, now brought by them, while the former suit was going on, it would, I consider, have been a matter of course to require them to elect between the action and the suit; and after decree, I conceive it to be right, in a case like the present, to put the parties in the same situation as they would have been in had an order to elect been made, and the election had been to proceed in equity. There are many instances of the Court's interfering after decree, where proceedings under the decree were pending, and it must, I consider, be competent for the Court so to interfere when no such proceedings are pending, including the case of the Plaintiff's bill having been dismissed. The Defendants also submitted that the Plaintiffs' contention must fail for want of an affidavit by themselves, and reference was made to the case of *Mollett* v. *Enequist* (4). In that case the Master of the Rolls required the Plaintiffs' own

(1) 7 D. M. & G. 722.
(2) 6 Madd. 290.
(3) 2 B. & B. 349, 353.
(4) 25 Beav. 609.

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affidavit, but this was because he considered the circumstances of that case rendered such affidavit proper. The circumstances of the present case do not render the Plaintiffs' case less reliable because they have not made an affidavit. I have not observed upon the nature of the action, and it is not necessary for me so to do; but I may say that the second count of the declaration not being founded on the policy, but on fraudulent representations made by persons not parties to the action, and made nearly twenty years before the commencement of the action, seems to me a very singular case to present to any Court. I cannot regard this otherwise than a vexatious action, and one which it is my duty to put an end to by granting an injunction according to the notice of motion.

Solicitors: Messrs. *Bray & Warrens;* Mr. *Ansley Windus.*

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LADY STANLEY OF ALDERLEY *v.* EARL OF SHREWSBURY.

[1874 S. 314.]

Ancient Lights—Injury nearly completed before Bill filed—Mandatory Injunction—Inquiry as to Damages.

13 Ch D 228

On a bill for injunction to restrain the completion and continuance of a building seriously obstructing ancient lights, it appeared that the building was almost completed before bill filed; that the Plaintiff had, before the commencement of the works, information that some building was proposed, and that she was abroad during the actual building, and had done nothing amounting to acquiescence:—

Held, that a mandatory injunction could not be granted; and an inquiry as to damages was directed, though not prayed by the bill.

THE Plaintiff, the widow of the late Lord *Stanley of Alderley*, who died in June, 1869, and the owner, under the will of her late husband (so long as she continued his widow), and occupier of the freehold house and premises situate on the west side of and numbered 40 in *Dover Street, Piccadilly*, after alleging that the windows in the house were ancient lights; that she and her predecessors in title had enjoyed as of right for more than twenty

years the unobstructed access of light and air to such windows; that there was at the back of the house a small court, or garden, on which no building had ever been erected; that the Defendant was the owner and occupier of the adjoining house, numbered 39, in the same street; that there was at the back of his house also a small court or garden, on which no building so high as the garden wall was ever erected; and that at the rear of his garden there was a low building used as a stable; complained by her bill, filed on the 20th of November, 1874, that the Defendant had recently pulled down the stable, and commenced the erection of a large new building on his court and garden, and on the site of the stable, which would seriously obstruct the access of light to the windows of her house, and that her house would be, by reason of such new building, rendered quite unsuitable for her *London* residence, and no mere damages would compensate for the injury which would be done thereto. The bill contained allegations, which described the position of the Defendant's new building; and statements setting forth the inconveniences which the Plaintiff would experience when the new building would be completed; and the Plaintiff prayed for an injunction to restrain the Defendant from erecting or allowing to remain upon his court or garden any building or other erection which might cause any obstruction to, or interference with, the access of light to the windows of her house and premises; and for further relief.

The Defendant, by his answer, stated that he had found his house and premises inconvenient, and that they required alteration; that he instructed the architect whom he employed to prepare plans and a model of the proposed new buildings, and to give notice (and such notice was given in January, 1874) to owners of adjoining premises of the proposed alterations; that the Plaintiff offered no objections; that the buildings were commenced in September, 1874, and that the Plaintiff did not make any complaint till the 11th of November, 1874. There was also an allegation that the new buildings did not in any material degree obstruct the access of light to the Plaintiff's house; a submission that the Plaintiff had acquiesced in the erection, and that she was not, even if the Court should be of opinion that she had sustained any material damage in regard to the alleged ancient

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lights by the erection of the new building, entitled to a mandatory injunction.

The evidence on the part of the Plaintiff was, that the light to the dining room and the kitchen, with a single window in each looking towards the west; to the library, with a single window looking towards the north; and to other rooms, with windows looking towards either the west or north, and all on the ground floor or basement, would be considerably diminished; also that the Plaintiff who was in *London* in August, 1874, for only four days, and then left for the Continent, when there was no new building erected, was not aware, until shortly before the filing of her bill, of the Defendant's proceedings in respect of his new building. And she denied that she had acquiesced in what had been done. The evidence in reference to the plans and model was conflicting. The result of it appears in the judgment.

A motion for an injunction, made on the 25th of November, 1874, was ordered to stand over till the hearing of the cause.

Mr. *Lindley* Q.C., and Mr. *B. B. Rogers*, for the Plaintiff, contended that upon the evidence, the ancient lights in the Plaintiff's house would suffer very considerable injury; the house would practically be ruined by what had been done; that the Plaintiff and the residents in her house would, if the Defendant's new building should be permitted to remain as it was, have to undergo much inconvenience, and that upon the authorities she was entitled to a mandatory injunction, and to have her property restored to what it substantially was before the alterations took place. Damages for the injury could not be estimated—they could not be a proper measure of relief in such a case. They were not asked for, nor were they desired by the Plaintiff, it not being with her a money question.

They referred to *Durell* v. *Pritchard* (1); *Aynsley* v. *Glover* (2); *Martyr* v. *Lawrence* (3); *Phillips* v. *Treeby* (4); *Great North of England, &c. Railway Company* v. *Clarence Railway Company* (5); *Isenberg* v. *East India House Estate Company* (6); *Curriers' Com-*

(1) Law Rep. 1 Ch. 244–250. 12 Jur. N.S. 16
(2) Law Rep. 18 Eq. 544; Ibid. 10 Ch. 283.
(3) 2 D. J. & S. 261. 10 Jur. N.S.
(4) 3 Giff. 632. 8 Jur. N.S. 71
(5) 1 Coll. 507.
(6) 3 D. J. & S. 263. 10 Jur. N.S. 221.

pany v. *Corbett* (1); *City of London Brewery Company* v. *Tennant* (2); and *Kelk* v. *Pearson* (3); and to the judgment of Vice-Chancellor *Kindersley* in *Martin* v. *Headon* (4).

Mr. *Dickinson*, Q.C., and Mr. *Cookson*, for the Defendant, submitted that the evidence shewed that the building was practically completed on the day when the bill was filed. The building was not carried higher, except the putting on of the roof, after that day. That it also shewed that there would be full access of light to the Plaintiff's rooms, except, perhaps, to the kitchen, and that there had not been that material interference with the Plaintiff's ancient lights which would justify the Court in granting a mandatory injunction.

[The VICE-CHANCELLOR intimated that he was of opinion that he could not, on the evidence, grant a mandatory injunction.]

The Defendant believed that though the new building was not commenced till September, yet that everything had been properly arranged as early as February, 1874, and that by the erection of the new building in the manner in which it had been done, no substantial injury would be suffered by the Plaintiff; but though it was his belief that there had been no perceptible interference with the access of light to the Plaintiff's house, yet he would not resist an inquiry as to whether the Plaintiff had suffered damage or not.

They referred to *Beadel* v. *Perry* (5), and *Aynsley* v. *Glover* (6), and to the judgments in *City of London Brewery Company* v. *Tennant*, and *Durell* v. *Pritchard* (7).

SIR CHARLES HALL, V.C.:—

I have already intimated that I cannot grant a mandatory injunction in this case. The reasons given in the judgment of Lord *Westbury* in the case of *Isenberg* v. *East India House Estate Company* (8), are conclusive against the granting of such an injunc-

(1) 2 Dr. & Sm. 355.
(2) Law Rep. 9 Ch. 212–219.
(3) Ibid. 6 Ch. 809.
(4) Ibid. 2 Eq. 425.
(5) Law Rep. 3 Eq. 465.
(6) Ibid. 18 Eq. 544.
(7) Ibid. 1 Ch. 244.
(8) 3 D. J. & S. 263.

12 Jur. N.S. 387. 2 U 2
12 Jur. N.S. 16
10 Jur. N.S. 221 2
4 De G. J. & S. 764. 11 Jur. N.S. 719.

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tion. The rule is clearly stated in the report of that case (1), and I do not think that the Plaintiff has brought her case within the scope of an ancient mansion referred to there. In *Durell* v. *Pritchard*, Lord Justice *Turner* said (2): "The authorities upon this subject lead, I think, to these conclusions: that every case of this nature must depend upon its own circumstances, and that this Court will not interfere by way of mandatory injunction, except in cases in which extreme, or, at all events, very serious damage will ensue from its interference being withheld." And the same learned Judge, in the case of *Curriers' Company* v. *Corbett* (3), intimated that the Court would not interfere except in a case where the building was unfinished when the bill was filed. That, however, might lead to the consideration of the question whether in this case the building was actually completed within the meaning of the expressions used by that learned Judge; but it is not necessary for me to enter upon a consideration of that. Having regard to the opinions of the learned Judges, so expressed in those cases, and also to what was done in the case of *City of London Brewery Company* v. *Tennant* (4), and in particular to the observations of Lord *Selborne* (5), that "the Court has power, if it thinks fit, to grant a mandatory injunction . . . . and however sound the proposition may be that a decree for damages can be made only where the power of granting an injunction exists, I am not prepared to lay it down as a general proposition, that because the building complained of has been completed before the bill has been filed damages cannot be recovered. It is manifest that a decree for damages would prevent multiplicity of actions," it appears to me that I should not, under all the circumstances of this case—the building having been carried up so high and substantially completed before the bill was filed—grant a mandatory injunction. I do not forget what was stated by Vice-Chancellor *Kindersley* in *Curriers' Company* v. *Corbett* (6), that but for the trifling nature of the Plaintiff's case the Court would have interfered by injunction. But I must take the law as to mandatory injunction from the

(1) 3 D. J. & S. 272. (4) Law Rep. 9 Ch. 212.
(2) Law Rep. 1 Ch. 250. (5) Ibid. 219.
(3) 4 D. J. & S. 764. (6) 2 Dr. & Sm. 355.

other authorities to which I have referred. Then, ought there to be an inquiry as to damages? and, as to that, I will refer to the observations of Lord Justice *James*, in the case of *Kelk* v. *Pearson*, where he says (1) that a person "was to have an amount of light through the windows of a house, which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house." This statement of the law was approved by Lord *Selborne* in *City of London Brewery Company* v. *Tennant* (2). Then, has there been such an interference with the light to the Plaintiff's house? The question is one of fact, and, according to my judgment, looking at the evidence, there has been an interference with the comfortable use and enjoyment of the Plaintiff's house as a dwelling-house—an interference which fairly entitled her to come to this Court to have the question determined whether, under all the circumstances, very peculiar in many respects, there ought, or ought not, to be a mandatory injunction. The Plaintiff does not pray for an inquiry as to damages, but it is competent to the Court to direct such an inquiry. If the Defendant had made out that the Plaintiff had acquiesced in what he had done, that she was entirely in the wrong, and ought not to have come to this Court at all, I should not have directed an inquiry; but no case of acquiescence has been made out. The Plaintiff knew in the early part of the year that something would be done by the Defendant to his premises; but I do not consider that she was bound, when she left for the Continent, to have a person constantly on the watch to see what might take place. I do not say that the Defendant can be charged with having proceeded with undue haste, but as a matter of fact the Plaintiff did not know that the building had been proceeded with until it was nearly finished; therefore I cannot hold that such a case of acquiescence has been made out against her as would prevent her from obtaining the relief which she might otherwise be entitled to. The Plaintiff comes to the Court for a mandatory injunction, and upon the evidence—it is not necessary for me to go through it—makes out that there has been substantial interference with the comfortable use and enjoyment of her dwelling-house, and the question is whether this Court should send the Plaintiff to a Court of law for a jury to assess the amount of

(1) Law Rep. 6 Ch. 811. (2) Law Rep. 9 Ch. 212.

V.-C. H. 1875

LADY STANLEY OF ALDERLEY v. EARL OF SHREWSBURY.

damage. If that question rested upon the case of *Durell* v. *Pritchard* (1), it might be embarrassing, having regard to what was said by the Master of the Rolls in *Aynsley* v. *Glover* (2), in reference to the case of *Curriers' Company* v. *Corbett* (3), and to *Lord Cairns' Act*, as to the jurisdiction of this Court. The Master of the Rolls said (4): "Now the first remark upon that is this: it only arises when the Court of Chancery has jurisdiction to grant an injunction. It can only apply to those cases in which the Court could have granted an injunction, at all events at the time of the filing of the bill; and if the Court could have granted an injunction, it ought to have granted the injunction."

It would be very unfortunate if the Plaintiff were to have to commence proceedings at law. In the case of the *City of London Brewery Company* v. *Tennant* (5) Lord Justice *James* said, in reference to *Durell* v. *Pritchard*, that he thought that case was not to be relied on as establishing the doctrine that unless there was a clear case for a mandatory injunction as to the whole of the building, there was no case for the Court's interference, and he said that this Court would not be slow to give relief in damages where, although no sufficient case for a mandatory injunction were made, it found that a case for substantial damages might be laid before a jury, and so the Court might, by interfering under the powers of *Lord Cairns' Act*, prevent multiplicity of actions. Having regard to what was so said by Lord Justice *James*, and to what Lord *Selborne* said in the same case, I am of opinion that the proper course to take will be to direct an inquiry as to damages, as in *Isenberg* v. *East India House Estate Company* (6). The costs of the motion for an interlocutory injunction must be costs in the cause, and all the costs will be reserved until after the certificate of the Chief Clerk has been made. In reference to the plans and the model, I think there has been some misapprehension on both sides, and I am glad I need not refer further to them.

Solicitors: Messrs. *Tathams, Curling, & Pym;* Messrs. *Parkin & Pagden.*

(1) Law Rep. 1 Ch. 244. 12 Jun 1875
(2) Ibid. 18 Eq. 544.
(3) 2 Dr. & Sm. 355.
(4) Law Rep. 18 Eq. 554.
(5) Ibid. 9 Ch. 212.
(6) 3 D. J. & S. 263. 10 Jun 1875

GRACE *v.* NEWMAN.

V.-C. H.
1875
March 21.

[1874 G. 99.]

Copyright—Book of Designs—Catalogue—Piracy—Copyright Act (5 & 6 *Vict. c.* 45)—*Costs.*

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A tradesman who employs another for remuneration to compile a book of designs for him is himself entitled to copyright in the book. A book in the nature of an advertising catalogue may be the subject of copyright.

Plaintiff, a cemetery stone mason, employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, with scarcely any letter-press :—

Held, that the Plaintiff had copyright in the book, and was entitled to an injunction to restrain the publication of designs copied from it.

Cobbett v. *Woodward* (1) commented upon.

Hotten v. *Arthur* (2) followed.

THE Plaintiff was the proprietor of the business known as "*Daniel's*," cemetery stone and marble mason at *Highgate* and *Nunhead*, and in 1870 he published a book containing 164 lithographic sketches of monumental designs, which was compiled by *T. F. Ward*, manager of the business carried on at *Highgate*. The book contained scarcely any letter-press. The sketches were taken from different tombstones in cemeteries by means of photographs and drawings. The preparation of the book occupied nearly a year, and great skill was required in combining and grouping the various designs to produce an artistic and harmonious effect. The object of the Plaintiff was to provide a volume which might serve as an advertisement, and be given to customers for the purpose of enabling them to select a design which the Plaintiff would be able to give an immediate price for and to have executed. On the 18th of July, 1871, the book was registered by the Plaintiff at *Stationers' Hall*.

The Defendant carried on business as a wholesale manufacturing stationer and lithographer in *London*.

On the 27th of July, 1874, the Defendant's traveller called at the Plaintiff's *Nunhead* premises, and offered a lithographed sheet of monumental designs for masons, for which he solicited orders.

(1) Law Rep. 14 Eq. 407. (2) 1 H. & M. 603.

V.-C. H. 1875 GRACE v. NEWMAN.

It was discovered that the designs were copies of the Plaintiff's, and that the Defendant had been soliciting orders for the sheet from the principal cemetery masons in *London* and the country.

The Plaintiff's solicitors wrote on the 31st of July, 1874, to the Defendant, complaining that he had infringed the Plaintiff's rights, and stating that unless all the sheets were given up and the names of the persons who had bought copies mentioned, a bill would be filed. No reply having been sent to that letter, the Plaintiff on the 4th of August, 1874, filed this bill praying for an injunction to restrain the Defendant from printing, publishing, selling, delivering, or otherwise disposing of the sheet of monumental designs, or any other sheet in the compilation of which the Plaintiff's book of monumental designs had been used, and from copying or pirating any parts of the book; for an account; and for costs and damages.

Mr. *Greene*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff:—

Mr. *Ward* was employed by the Plaintiff, and directed to obtain the best information and the best designs which he could, with the view of publishing this book. He was well paid by the Plaintiff for all that he did, and what he did was for him, and the case stood just as if he had done everything connected with the book himself. He was, in fact, the proprietor of the book. An attempt may be made on the part of the Defendant to bring this case within the section of the *Copyright Act* (5 & 6 Vict. c. 45), which has reference to periodicals, &c.; but it is clear that that section does not apply to this case. The case of *Cobbett* v. *Woodward* (1) is distinguishable from the present; besides, the case of *Hotten* v. *Arthur* (2) was not cited in the arguments in that case, otherwise the decision, it is presumed, would have been different. This case is clearly governed by *Hotten* v. *Arthur*.

[They also referred to the cases of *Bogue* v. *Houlston* (3); *Kelly* v. *Morris* (4); *Hogg* v. *Scott* (5).]

Mr. *W. C. Renshaw*, for the Defendant:—

This book of designs is not a literary work, nor can it be con-

(1) Law Rep. 14 Eq. 407.
(2) 1 H. & M. 603.
(3) 5 De G. & Sm. 267.
(4) Law Rep. 1 Eq. 697.
(5) Law Rep. 18 Eq. 444.

tended that it will be of lasting benefit to the world, in fact it can be of no benefit to any one except to the Plaintiff, and therefore it does not come within the preamble of the *Copyright Act*. The decision in *Cobbett* v. *Woodward* (1) really governs this case. These designs were taken from cemeteries and churchyards, which are places open to all persons. The book is, as the bill states, a mere advertisement, and there is no copyright in that. The copying of an advertisement does no wrong unless the public are led to believe that the person copying can sell the articles referred to. Even if it should be considered that there is a copyright in this book, it does not belong to the Plaintiff, but to Mr. *Ward* who obtained the designs, and who is, in fact, the author of the book within sect. 3 of the *Copyright Act* (5 & 6 Vict. c. 45). It cannot be successfully contended that the Plaintiff is under sect. 13 of the Act the assignee of *Ward*. There has been no writing, even, shewing that he is. *Davidson's* Conveyancing (2) and *Jefferys* v. *Boosey* (3) shew that neither at law nor in equity has the title passed to the Plaintiff as the assignee of *Ward*. *Marsh* v. *Conquest* (4) is also in point. Nor has the Plaintiff become entitled to any copyright in the book under sect. 18 of the Act: *Brown* v. *Cooke* (5); *Wood* v. *Boosey* (6). Under these circumstances there ought to be no injunction, and certainly the Defendant ought not to be made to pay any costs.

SIR CHARLES HALL, V.C.:—

This case has been argued by Mr. *Renshaw* with an amount of accuracy and learning worthy of a much greater case. The first question is, whether the case comes within the *Copyright Act?* The contention has been that it does not, because the book is not capable of being described as one of lasting benefit to the world; but it appears to me that I cannot do otherwise than hold that this is a work which comes within the description mentioned in the Act. It is true that this work has little letter-press; but it is full of interesting matter, which I have no doubt is very

(1) Law Rep. 14 Eq. 407.
(2) Vol. ii. p. 1153.
(3) 4 H. L. C. 815.
(4) 17 C. B. (N.S.) 418.
(5) 11 Jur. 77.
(6) Law Rep. 2 Q. B. 340; Ibid. 3 Q. B. 223.

V.-C. H. 1875 GRACE v. NEWMAN.

often referred to and consulted as well by persons who contemplate their own deaths as by others in reference to those who have died. Next, it was contended, that the Plaintiff is not entitled to a decree because he has not brought himself within the section of the Act which refers to authors and their assignees; but I think the words of the section are wide enough to embrace the case of a person employing another person, and remunerating that person for the work done. The person remunerated has no claim to the copyright, but it is the property of the person who remunerates him, and in this Court the person who remunerates must be taken to be the equitable assignee, and the publisher within the meaning of the Act. It was also contended that this work is not entitled to any protection having regard to its character—that it is, in fact, a mere advertisement, and that an advertisement is not, on the authority of *Cobbett* v. *Woodward* (1), entitled to protection. The decision in that case turned entirely upon the circumstances which existed in it—it was a catalogue of articles which were being offered for sale. But it does not appear that the case of *Hotten* v. *Arthur* (2) was mentioned to the Master of the Rolls, and whether if it had been his Lordship's decision would have been different it is difficult to say, but certainly it was decided in *Hotten* v. *Arthur* that a catalogue may, under certain circumstances, be protected by injunction. In this case the Plaintiff has been right from the beginning, and the Defendant has been wrong. The Plaintiff was, in my opinion, right in filing this bill, and the Defendant was wrong in resisting it, therefore there must be an injunction as asked for, and the Defendant must pay the costs of the suit.

Solicitors: Messrs. *J. G. Hepburn & Sons*; Mr. *E. M. Chubb*.

(1) Law Rep. 14 Eq. 407. (2) 1 H. & M. 603.

BRITISH MUTUAL INVESTMENT COMPANY *v.* COBBOLD.

[1875 B. 38.]

V.-C. H. 1875 March 22.

Solicitor and Client—Jurisdiction—Mortgage—Alleged Negligence of Solicitor.

A bill will not lie against a solicitor for negligence in investigating a title.

Chapman v. *Chapman* (1) observed upon.

5 Ch D 443

DEMURRER.

Messrs. *R. F.* and *C. A. Piper*, in August, 1872, applied to the Plaintiffs, the *British Mutual Investment Company, Limited*, for a loan of £5000 on the security of their joint and several promissory note, and an equitable charge upon a freehold house, of which they represented that they were absolute owners in fee simple free from incumbrances.

The Defendant at that time acted as the solicitor of the Plaintiff company. The Plaintiff company entertained the application, and referred it to the Defendant, instructing him to investigate the title and to prepare an equitable mortgage with power of sale over the property, and a joint and several promissory note. The Defendant was to see that Messrs. *Piper* had a good title, and that the property was quite free from incumbrance. He undertook the matter, and shortly afterwards represented to the Plaintiff company that he was satisfied with the Messrs. *Piper's* title to the property, and he prepared a promissory note and an equitable mortgage. The transaction was completed on the 3rd of September, 1872. The Messrs. *Piper* received the money. The note was made payable two months from that date, but it was dishonoured at maturity. *R. F.* and *C. A. Piper* were adjudicated bankrupt in April and May, 1873, respectively. It was alleged that it was not probable that anything would be recovered from either estate in respect of the £5000, and that no proof in respect of the debt had been made under either bankruptcy. The value of the property mortgaged was £7000, but the Messrs. *Piper*,

(1) Law Rep. 9 Eq. 276.

V.-C. H. 1875

BRITISH MUTUAL INVESTMENT COMPANY v. COBBOLD.

instead of being absolutely entitled to it, as they professed to be, were beneficially entitled to only an undivided moiety. The property was also charged with a life annuity, and was subject to a contract for sale to the lessee of it. The bill alleged that the defect in the Messrs. *Piper's* title might and ought to have been discovered by the Defendant before he accepted it on behalf of the Plaintiff company; and also that it would have been so discovered by him if he had investigated the title with reasonable care and skill. The Plaintiff company also alleged that the Defendant had made the investigation in so negligent and unskilful a manner that he had failed to discover the defects in Messrs. *Piper's* title; and the prayer of the bill was for a declaration that the Defendant was liable to make good to the Plaintiff company the loss which had been in consequence sustained, and take the property off its hands. The bill also stated that the Plaintiff company had filed a bill against the trustees in bankruptcy of Messrs. *Piper*, having for its object the realization of the security. That suit was still pending.

The Defendant demurred.

Mr. *Lindley*, Q.C., and Mr. *Davey*, for the demurrer, submitted that as the case made by the bill was one of negligence and not fraud, the remedy, if any, was by action at law and not by bill in equity; and that even if there was a remedy in this Court, the actual loss, if any, had not been at present discovered by the Plaintiff company, as the proceedings in bankruptcy were pending, and other proceedings had been commenced by the Plaintiff company which might produce a good result; therefore the demurrer ought to be allowed.

Mr. *Dickinson*, Q.C., and Mr. *Phear*, for the bill, contended that what the Court was asked to do by this demurrer was to overrule the authoritative determination of Vice-Chancellor *Stuart* in *Chapman* v. *Chapman* (1), and to hold that this Court had no jurisdiction to do that which the bill asked for. The Court was asked to exercise a jurisdiction over the Defendant by reason of his being an officer of the Court, and that consideration was absent

(1) Law Rep. 9 Eq. 276.

in the case of *Mare* v. *Lewis* (1). In that case the jurisdiction could not be exercised because the *Statute of Limitations* enabled the solicitor to escape from his liability; but in this case that statute had no application. The Plaintiff company's case was not put upon fraud or trust, but on this: that this Court had a concurrent jurisdiction with the Courts of Law against its own officers, and that it could, therefore, give the relief asked for. A case of more culpable negligence there could not be if the allegations in the bill should be sustained by the evidence. It was clear that the Court had jurisdiction over its officers in respect of malfeasance, and where was the distinction between malfeasance and nonfeasance? There was no distinction in principle at all. They also referred to *Craig* v. *Watson* (2), *Smith* v. *Pococke* (3), *Dixon* v. *Wilkinson* (4), —— v. *Jolland* (5), *Floyd* v. *Nangle* (6), and *Courtney* v. *Stock* (7).

SIR CHARLES HALL, V.C.:—

I am of opinion that this demurrer must be allowed. The Plaintiff company, by its bill, in effect asks for a declaration that the Defendant is liable to make good to the company the loss which it has sustained through his negligent and unskilful management on its behalf of the matter referred to him by the company, and the substance of the bill is to make the solicitor of the company take the security of his former client off the hands of such client. I believe that this is the first instance of an attempt of this kind, for I do not find in any of the cases referred to any attempt of a like nature. It would, in my opinion, be an alarming thing to solicitors who prepare mortgage deeds for clients to say that if guilty of negligence the clients would be entitled in this Court to a remedy additional to that which they have by an action at law; that this Court would compel a solicitor to take the mortgage security off his client's hands, and find the money necessary for the purpose—it might be a sum of £100,000. There is no jurisdiction in this Court to enable it to do that. In *Smith* v.

(1) Ir. L. Rep. 4 Eq. 219.
(2) 8 Beav. 427.
(3) 2 Drew. 197.
(4) 4 De G. & J. 508.
(5) 8 Ves. 72.
(6) 3 Atk. 568.
(7) 2 D. & War. 251.

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BRITISH MUTUAL INVESTMENT COMPANY v. COBBOLD.

Pococke (1) something of that sort was attempted, but there the solicitor had the money of his client in his hands, and he acted fraudulently and improperly, for he gave his client a security which was worthless. The authorities referred to are against the Plaintiffs, and even the decision of Vice-Chancellor *Stuart* in *Chapman* v. *Chapman* (2) is against them; for that learned Judge said that a plaintiff cannot be indemnified for an apprehended loss which may never occur, and in this case it is at present impossible to say what loss, if any, the Plaintiff company will sustain, as the bill only states that it is not probable the Plaintiffs will get any dividend, and that there has been no proof in either of the bankruptcies of the mortgagors; there may, therefore, be no loss at all. On that ground alone, treating it as the substance of the bill, I should allow the demurrer. But it appears that there is another suit pending at the instance of the Plaintiff company for the purpose of realizing the security, and when it has been realized and the suit worked out, the loss, if any, will be ascertained. It was contended that there is jurisdiction in this Court in a case of ordinary negligence on the part of a solicitor in reference to the investigation of a title to make such solicitor responsible, but I know of no authority in support of that proposition. *Craig* v. *Watson* (3) was referred to, but the special circumstances of that case prevent it being applicable to ordinary cases, and it shews that there is no such jurisdiction in ordinary cases. *Dixon* v. *Wilkinson* (4) was relied upon because of the observations of Lord Justice *Turner* in his judgment, and also in reference to —— v. *Jolland* (5); but when carefully looked at it appears to me that Lord Justice *Turner* was only considering the jurisdiction of the Court in respect of actual loss. Those observations, therefore, do not apply to this case; and the same may be said of the observations of Lord *Eldon*, who stated that it was a grave question whether a receiver might not be compelled to make good the loss which had been occasioned by his acts. The case of *Chapman* v. *Chapman* I have already referred to. The Vice-Chancellor *Stuart* no doubt said that for gross negligence there might be relief granted by this Court, but that observa-

(1) 2 Drew. 197. 18 Jur 478
(2) Law Rep. 9 Eq. 276.
(3) 8 Beav. 427.
(4) 4 De G. & J. 508. 5 Jur N.S.
(5) 8 Ves. 72.

tion was only a *dictum*. In *Mare* v. *Lewis* (1) the Vice-Chancellor of *Ireland* expressed a clear opinion against the existence of such a jurisdiction. I certainly have never understood that the Court would exercise such jurisdiction. There is a common law remedy, and the Plaintiff company must take their case to a Court of Law. The demurrer must be allowed.

Solicitors: Messrs. *Cobbold & Woolley;* Messrs. *Barnard & Co.*

ALLEN *v.* JACKSON.

[1874 A. 54.]

Will—Marriage, Restraint of—Second Marriage of a Man.

Bequest to husband and wife for their lives and the life of the survivor, with a gift over in the event of the husband surviving and marrying again:—

Held, that the attempted defeasance of the husband's life interest was void as a condition subsequent in restraint of marriage.

Mrs. *FRANCES JACKSON*, a widow, who died in January, 1863, by her will bequeathed her property to trustees upon trust to pay to *Ellen Ada*, her niece and adopted daughter, the wife of *Robert Noble Jackson*, the sum of £40 per annum for life for her separate use; and in the next place to pay the remaining income of the property to her nephew, *R. N. Jackson*, and his wife, and their assigns, during their joint lives; and after the death of either of them, to the survivor for life; with a proviso that if *E. A. Jackson* should die in the lifetime of her husband, and he should marry again, the trustees were to stand possessed of the property on the trusts thereinafter mentioned, being trusts for persons other than the husband.

E. A. Jackson died in January, 1864. In January, 1874, *R. N. Jackson* married again. His second wife was still living, and he claimed, notwithstanding his second marriage, to be entitled to receive the income of the testatrix's residuary estate; and the question was whether his second marriage was a forfeiture of his interest in the property or not.

(1) Ir. L. Rep. 4 Eq. 219.

V.-C. H. 1875 ALLEN v. JACKSON.

The bill was filed by the trustees, praying for a declaration whether *R. N. Jackson* was or was not entitled to receive such income, and for administration of the estate.

Mr. *Greene*, Q.C., and Mr. *Langworthy*, for the Plaintiffs, the trustees, stated the facts of the case.

Mr. *Lindley*, Q.C., and Mr. *Smart*, for the Defendants who were interested in the gift over, after referring to the cases of *Evans* v. *Rosser* (1), *Charlton* v. *Coombes* (2), *Newton* v. *Marsden* (3), *Lowe* v. *Peers* (4), *Harvey* v. *Aston* (5), *Morley* v. *Rennoldson* (6), and *Tricker* v. *Kingsbury* (7), submitted that the gift over was good. If "he" had been a "she," the law was clear, and no distinction could be drawn between the second marriage of a man and the second marriage of a woman. The condition in restraint of the second marriage in this case was therefore not bad, and there was substantially no distinction between this case and *Newton* v. *Marsden*.

Mr. *Dickinson*, Q.C., and Mr. *Holland*, for the Defendant *R. N. Jackson*, were not called upon.

SIR CHARLES HALL, V.C.:—

I am of opinion that I cannot hold the law to be the same as to the second marriage of a man as it is as to the second marriage of a woman. The law as regards the second marriage of a woman is exceptional. In *Newton* v. *Marsden*, Vice-Chancellor *Wood* held that a condition in restraint of marriage annexed to a bequest to a widow was valid though such widow was not the wife of the testator. In *Evans* v. *Rosser*, the same learned Judge construed the will as containing the condition in the gift itself, so as to make the gift good only until the second marriage of the legatee. Some may think there are reasons for not applying the exception to the general rule to the case of a man. Some may think other-

(1) 2 H. & M. 190.
(2) 11 W. R. 1038.
(3) 2 J. & H. 356.
(4) 4 Burr. 2225.
(5) 1 Atk. 361, 366.
(6) 2 Hare, 570.
(7) 7 W. R. 652.

wise; but I consider that I cannot extend the exception to the case of a man. The laws applicable to men and women, their rights, obligations, and disabilities, have not yet been assimilated in all respects, and were I to assimilate them in this case I consider I should not be administering the law, but making new law. The condition in this case, it should be observed, is subsequent, and not, I consider, to be read as contained in the gift itself. The declaration must be, that the gift to *R. N. Jackson* is not void, notwithstanding he has contracted a second marriage, and all the costs must come out of the estate.

Solicitors: Messrs. *Parker*, agents for Messrs. *Dalton & Salusbury, Leicester*; Mr. *R. J. Child*, agent for Mr. *Plumbe, Winchcomb.*

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ACQUIESCENCE IN BUILDING—*County Court Appeal—Lease—Parol Agreement—Outlay upon Property.*] *A.*, a tenant in possession, filed a bill against *B.* for the specific performance of a parol agreement for a lease of thirty years. *A.* had contracted to sub-let, and his sub-lessee had expended money in alterations and repairs with the knowledge and approval of *B.*:—*Held* (reversing the decision of the County Court Judge), that the outlay by the sub-lessee was as much a part performance of the agreement as if made by *A.*, who was therefore entitled to specific performance.—The Court will not, upon appeal from a County Court, entertain an objection which is not raised in the case settled by the County Court Judge. WILLIAMS *v.* EVANS - - - - 547

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ADMINISTRATION SUMMONS—*Practice—Will of Married Woman—Service of Order*—15 & 16 *Vict. c.* 86 *ss.* 45, 42.] A married woman, having under a will an absolute power over a fund, made a will whereby she appointed it specifically to trustees upon trust for *A.* for life, with remainders over; and made a residuary gift to the same trustees upon certain trusts. One only of the trustees proved the will:—*Held*, that the Court had jurisdiction under 15 & 16 Vict. c. 86, s. 45, to make an order upon summons by *A.* for administration of the estate of the married woman.—Under 15 & 16 Vict. c. 86, s. 45, the only person to be served with the summons is the executor or administrator of the deceased; but the Court has power to direct service of the order upon other persons with the like effect as when service of a decree is directed under sect. 42. *In re* BERKELEY'S ESTATE. BERKELEY *v.* MASON 467

ADVANCEMENT—*Will—Construction—Ejusdem Generis Doctrine—Advancement Clause—Power to apply Part of Fund for Preferment, Advancement, or otherwise for the Benefit of an Adult—Payment of Debts.*] A testator bequeathed a fund upon trust for *L.* during his life, and after his decease for his children as he should by will appoint, and in default of appointment for his children, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. The testator empowered the trustees, at any time or times during the life of *L.*, to apply any part of the fund not exceeding one moiety in or towards the preferment or advancement of *L.*, or otherwise for his benefit as the trustees should in their discretion think fit. At the date of the will *L.* was thirty years of age, and had been married for nearly three years:—*Held*, that the trustees might apply one moiety of the trust fund in payment of debts incurred by *L.*, the interest on which absorbed nearly the whole of *L.'s* income, and the principal of which he was unable to pay out of his own resources. LOWTHER *v.* BENTINCK - - - - - 166

2. —— *Transfer of Stock into Names of Transferor, Daughter, and Son-in-law—Resulting Trust.*] Stock was transferred by a lady into the names of herself, her daughter, and the daughter's husband: the dividends on the stock were received by the son-in-law and paid over to the transferor

ADVANCEMENT—*continued.*
during her life. The daughter predeceased her mother, and the son-in-law survived her:—*Held*, that there was no resulting trust, and that the son-in-law was entitled to the stock. BATSTONE *v.* SALTER - - - - - 250

ADVERTISEMENTS—Service by - 48, 49, n.
See PRO CONFESSO. 1, 2.

AFFIDAVIT—With bankruptcy petition - 52
See PETITION FOR ADJUDICATION. 1.

AFTER-ACQUIRED PROPERTY—Liquidation by arrangement—Discharge of debtor 245
See CLOSE OF LIQUIDATION.

AGENT—Contract—Estate agent—Authority 108
See CONTRACT BY AGENT.

—— Fraudulent transaction—Parties to suit for discovery and costs - - 171
See BANKRUPT DEFENDANT.

—— Injury to employer's property—Use of author's name - - - 207
See COPYRIGHT IN BOOK.

—— Insurance company—Misdescription of buildings - - - - 485
See MISSTATEMENT IN POLICY.

AGREEMENT—Lease for life—Part performance
See FRAUDS, STATUTE OF. 1. [174

—— Liability for debt of another - - 198
See FRAUDS, STATUTE OF. 2.

—— Parol agreement for lease—Specific performance - - - - - 547
See ACQUIESCENCE IN BUILDING.

AGREEMENT NOT TO CONTEST WILL—*Injunction—Proceedings in Probate Court.*] Injunction granted to restrain proceedings in the Probate Court by heir-at-law and next of kin for the purpose of obtaining administration and opposing probate of a draft will in contravention of an undertaking and deed by which Defendants admitted the validity and confirmed the dispositions of the draft will, giving up all interest which they would have taken in the event of an intestacy. WILCOCKS *v.* CARTER - - - 327

AGREEMENT NOT TO TENDER—*Injunction—Breach of Contract—Parties.*] Tenders for the supply of stone having been invited by a corporation, it was agreed between *A.*, *B.*, *C.*, and *D.*, quarry owners, that *B.* should not tender, that *C.* and *D.* should tender above *A.'s* price, that *A.* should purchase certain quantities of stone from *B.*, *C.*, and *D.* at a fixed price, and that *B.*, *C.*, and *D.* should not supply the corporation with stone during 1875.—The stone was purchased, as agreed, by *A.*, but *B.*, in breach of the agreement, sent in a tender, which was accepted:—*Held*, on demurrer, that the agreement was not void, and that a bill would lie by *A.* to restrain *B.* from supplying the corporation directly or indirectly during 1875 with stone, without making the corporation parties. JONES *v.* NORTH - - 426

ALIEN—Married in *England* - - 334
See ALIEN'S SETTLEMENT.

ALIEN'S SETTLEMENT—*Marriage between Turkish and English Subjects in England—English Settlement—Decree of Divorce in Turkey—Foreign Judgment—Absence of Notice.*] A settlement on a marriage in *England* between a domiciled Turkish subject and an English lady, on the faith of his promise to reside in *England*, *held* to be governed by English law.—A divorce in *Turkey*, the effect of which by Turkish law was to annul the settlement, but which was pronounced without notice to the wife or the persons interested under the settlement, disregarded. COLLIS *v.* HECTOR [334

ANCIENT LIGHTS—Mandatory injunction 616
See MANDATORY INJUNCTION.

ANNEXATION—Kingdom of *Oudh* - 509
See SOVEREIGN ACT OF STATE.

ANNUITY—Charged on land—Due before rent day - - - - - 271
See APPORTIONMENT.

APPEAL—Bankruptcy - - 253, 266
See BANKRUPTCY APPEAL. 1, 2.

—— Evidence - - - - 253
See BANKRUPTCY APPEAL. 1.

APPOINTMENT—New trustee—Vesting order
See TRUSTEE ACT. [352

—— Special power—Intervention of trustees 16
See APPOINTMENT TO TRUSTEES.

APPOINTMENT TO TRUSTEES—*Special Power—Intervention of Trustees.*] Where a person having a special power of appointment over a fund of personalty appoints to trustees for the objects of the power, the Court, though recognising the validity of such an appointment, will not, as a matter of right, transfer the fund to the trustees appointed by the donee of the power.—*Ferrier* v. *Jay* (Law Rep. 10 Eq. 550) distinguished. BUSK *v.* ALDAM - - - - - 16

APPORTIONMENT—*Will—Specific Devise—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 4, 7—*Will made before Act—Gift of Rent-charge—Instalments due before Rent Day—Mode of Payment.*]—*Held*, that the *Apportionment Act*, 1870, applies to a specific as well as to a residuary devise:—*Held*, also, that the Act applies to a devise contained in a will dated before the Act to which a codicil was made after the Act.—*Semble*, the result would have been the same without the codicil.—Where a testator charges an annuity on land with the ordinary power of distress and entry in the event of the annuity being in arrear, the annuitant must wait for payment of the annuity until the first rent day which occurs after the day fixed by the testator for payment of an instalment of the annuity, and is not entitled to require that any prior rent should be kept in hand in order to answer the instalment. HASLUCK *v.* PEDLEY - - - - - 271

ARBITRATION—Submission to - 14, 599
See SUBMISSION TO ARBITRATION. 1, 2.

ARTICLES OF ASSOCIATION—Increase of capital [358
See INCREASE OF CAPITAL OF COMPANY.

ARTICLES OF PARTNERSHIP—Arbitration clause - - - 14, 599
See SUBMISSION TO ARBITRATION. 1, 2.

ASSIGNMENT—Balance at bankers - - 74
See CHEQUE.

—— Debenture—*Chose in action*—Equities between obligor and obligee - - 302
See DEBENTURE.

ASSIGNMENT—*continued.*
—— Future patents - - - - 462
See Assignment of Patent.

ASSIGNMENT OF PATENT—*Covenant to assign future Patents of like Nature—Public Policy.*] An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy. Printing and Numerical Registering Company *v.* Sampson - - - - - 462

AUTHORITY—Estate agent - - 108
See Contract by Agent.

BANK OF ENGLAND—Transfer of stock—Married Women's Property Act - - 295
See Married Women's Property Act.

BANKER—Cheque—Assignment of balance 74
See Cheque.
—— Deposit notes—Will - - - 222
See "Securities for Money."

BANKRUPT DEFENDANT—*Pleading—Parties—Fraudulent Conveyance by Bankrupt.*] A bankrupt is not a proper party to a suit instituted by the trustee under his bankruptcy to set aside a conveyance executed by the bankrupt with intent to delay or defeat his creditors.—The rule that a person implicated in a fraudulent transaction may be made a party to a suit impeaching the transaction, for purposes of discovery and costs, is confined to cases in which the Defendant fills the position of agent (including that of attorney or solicitor) or arbitrator. Weise *v.* Wardle 171

BANKRUPTCY—Act of—Notice - - 253
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—— Adjudication—Evidence - - 52
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—— Adjudication under Rule 226 - - 441
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—— Close of liquidation - - - 245
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—— Composition with creditors - - 261
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—— Discovery of bankrupt's property—Service of summons - - - - 131
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See Injunction in Bankruptcy.
—— Joint and separate estates - - 256
See Joint and Separate Estates.
—— Order and disposition - - - 264
See Order and Disposition.
—— Parties to suit—Bankrupt Defendant 171
See Bankrupt Defendant.
—— Petition for adjudication - 52, 441
See Petition for Adjudication. 1, 2.
—— Voluntary settlement - - - 433
See Voluntary Settlement.

BANKRUPTCY APPEAL—*Evidence—Admissibility.*] Evidence taken before, but not used upon, the original hearing not admitted upon the hearing of an appeal. *Ex parte* Harris. *In re* James - - - - - - - 253

2. —— *Practice—Time for Appealing—Bankruptcy Rules,* 1870, *r.* 143.] Notice of an appeal must be given within twenty-one days from the day on which the order appealed from was pronounced, not from the day on which it was drawn up. *Ex parte* Hinton. *In re* Hinton - 266

BENEFIT SOCIETY—Customs Annuity and Benevolent Fund - - - 274
See Customs Annuity and Benevolent Fund.

BILL OF EXCHANGE—Securities for—Proof in winding-up - - - - 1
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BILL OF SALE—Reputed ownership - 264
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—— Satisfaction of—Assignment of debt—Notice of act of bankruptcy - - 253
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BOND—Debenture of company - - 302
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CALL—Non-payment of, by Petitioner—Winding-up petition - - - - 416
See Winding-up Petition.
—— Set-off—Winding-up - - - 449
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CAPITAL—Preference shares—Company—Increase - - - - 358
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CASES—*Ashmore's Trusts, In re* (Law Rep. 9 Eq. 99) not followed - - - 286
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—— *Athenæum Life Assurance Society* v. *Pooley* (3 De G. & J. 294) observed upon 302
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—— *Attorney-General* v. *Abdy* (1 H. & C. 266) distinguished - - - 274
See Customs Annuity and Benevolent Fund.
—— *Bagot* v. *Legge* (2 Dr. & Sm. 259) considered
See Marshalling. 2. [96
—— *Barrow* v. *Bell* (5 E. & B. 540) observed upon - - - - - 264
See Order and Disposition.
—— *Chapman* v. *Chapman* (Law Rep. 9 Eq. 276) observed upon - - - 627
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—— *European Life Assurance Society, In re* (Law Rep. 10 Eq. 403) followed - 416
See Winding-up Petition. 2.

CASES—*continued.*

—— *Exhall Coal Mining Company, In re* (4 D. J. & S. 377) discussed - - - 60
See Distress after Winding-up.

—— *Ferrier* v. *Jay* (Law Rep. 10 Eq. 550) distinguished - - - - 16
See Appointment to Trustees.

—— *Foss, Ex parte* (2 De G. & J. 230) observed upon - - - - 264
See Order and Disposition.

—— *Hotten* v. *Arthur* (1 H. & M. 603) followed
See Copyright in Designs. [623

—— *Howe* v. *Lord Dartmouth* (7 Ves. 137) distinguished - - - - 395
See Enjoyment in Specie.

—— *Hutton* v. *Scarborough Cliff Hotel Company* (4 D. J. & S. 672) distinguished [358
See Increase of Capital of Company.

—— *Keene* v. *Beard* (8 C. B. (N.S.) 372) commented on - - - - 74
See Cheque.

—— *Lancefield* v. *Iggulden* (Law Rep. 17 Eq. 556) not followed - - - 96
See Marshalling.

—— *Loffus* v. *Maw* (3 Giff. 592) approved of 174
See Frauds, Statute of. 1.

—— *Lundy Granite Company, In re* (Law Rep. 6 Ch. 462) discussed - - 60
See Distress after Winding-up.

—— *Marson* v. *London, Chatham, and Dover Railway Company* (Law Rep. 6 Eq. 101) explained - - - - 83
See Compulsory Powers. 1.

—— *Mundel's Trust, Re* (8 W. R. 683) not followed - - - - 352
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—— *Pulsford* v. *Hunter* (3 Bro. C. C. 416) not followed - - - - 286
See Gift at Twenty-five.

—— *Rowland* v. *Cuthbertson* (Law Rep. 8 Eq. 466) dissented from - - 346
See Dower.

—— *Steed* v. *Preece* (Law Rep. 18 Eq. 192) followed - - - - 113
See Conversion.

—— *Waring, Ex parte* (19 Ves. 345) followed 1
See Securities for Bills of Exchange.

CATALOGUE—Designs—Copyright - 623
See Copyright in Designs.

CHARITY—Lands Clauses Act—Investment of purchase-money - - - 180
See Reinvestment of Purchase-money.

—— Mortmain - - - - 453
See Mortmain.

CHEQUE—*Banker—Equitable Assignment.*] A cheque is not an equitable assignment of the drawer's balance at his bankers.—*Dicta* in *Keene* v. *Beard* (8 C. B. (N.S.) 372) commented on. Hopkinson *v.* Forster - - - 74

CHILDREN—Gift to children and grandchild 26
See Gift per Capita or per Stirpes.

CHOSE IN ACTION—Debenture of company—Assignment - - - - 302
See Debenture.

CLASS—*Per capita* or *per stirpes* - - 26
See Gift per Capita or per Stirpes.

CLOSE OF LIQUIDATION—*Bankruptcy—Liquidation by Arrangement—Discharge of the Debtor—Bankruptcy Act*, 1869, *ss.* 12, 15, 47, 125. *sub-ss.* 7, 9—*Bankruptcy Rules*, 1870, *rr.* 139, 303, 304, 305—*Forms Nos.* 122, 123, 124.] Until a liquidation by arrangement under the *Bankruptcy Act*, 1869, has been closed by a resolution of creditors, property acquired by the debtor, though after he has obtained his discharge, is property divisible amongst the creditors.—The intention of the framers of the *Bankruptcy Act*, 1869, was, to make the close of the liquidation, the discharge of the debtor, and the release of the trustee, three separate and distinct things, to be granted by resolution of the creditors; and the fact that the creditors have granted the debtor his discharge does not imply that the liquidation is closed. *In re* Bennett's Trusts - - - - 245

COHABITATION—Return to—Separation deed—Equity to a settlement - - 539
See Separation Deed.

COLLIERIES—Leasehold — Profits — Tenant for life and remainderman - - 395
See Enjoyment in Specie.

COMMON — Appurtenant — Vicinage — Waste of forest - - - - 134
See Waste of Forest.

COMMISSIONERS—Reduction of National Debt
See National Debt Commissioners. [430

COMPANY—Compulsory powers - 83, 93
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—— Debenture—Assignment - - 302
See Debenture.

—— Director—Qualification - - 353
See Director's Qualification.

—— Distress after winding-up order - 60
See Distress after Winding-up.

—— Execution creditor—Leave to proceed after winding-up - - - - 202
See Leave to proceed after Winding-up.

—— Increase of capital - - - 358
See Increase of Capital of Company.

—— Infant transferee - - - 588
See Infant Transferee.

—— Winding-up petition - 182, 416, 444
See Winding-up Petition. 1, 2, 3.

—— Winding-up—Set-off - - - 449
See Set-off in Winding-up.

COMPOSITION WITH CREDITORS — Debt incurred by fraud - - - 436
See Injunction in Bankruptcy.

—— Powers of trustee—Rejection of proof 261
See Trustee in Composition.

COMPULSORY POWERS—*Railway Company—Purchase of Manufactory—Notice to treat, followed by Notice of Intention to apply for the Appointment of a Surveyor—Withdrawal of Notice to treat—Specific Performance refused—Lands Clauses Act*, 1845 (8 *Vict. c.* 18), *s.* 92—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 36.] A notice by the Defendants, a railway company, to treat for a part of the Plaintiffs' manufactory, was met by a counter-notice by the Plaintiffs, requiring them to take the whole. The Defendants then

COMPULSORY POWERS—*continued.*
gave the Plaintiffs notice of their intention to apply to the Board of Trade for the appointment of a surveyor to determine the value of the premises comprised in the notice to treat, and of the further lands and hereditaments which the Plaintiffs could lawfully require and had required the Defendants to purchase and take. The Plaintiffs then filed their bill, praying for a declaration that the Defendants could not take a part of the manufactory without taking the whole; whereupon the Defendants gave notice of their intention to withdraw from their notice to treat, offering to pay the Plaintiffs' costs of suit up to that date; but the Plaintiffs declined the offer, and insisted on an answer, which was filed.—The bill was then amended, and, as amended, prayed for a declaration that the Defendants were bound to take the whole manufactory:—*Held*, that the Defendants' notice of their intention to apply for the appointment of a surveyor did not amount to a binding contract by them to take the property; hence that they were at liberty to withdraw their notice to treat; and specific performance as prayed by the amended bill refused.—*Marson* v. *London, Chatham, and Dover Railway Company* (Law Rep. 6 Eq. 101; Ibid. 7 Eq. 546) explained. Grierson *v.* Cheshire Lines' Committee - - 83

2. —— *Railway Company—Possession taken—Interest on Compensation Money.*] Interest at 4 per cent. is payable by a railway company upon the purchase or compensation money from the time of their taking possession of the land under their statutory powers, and not merely from the subsequent period of ascertaining the price by the verdict of a jury. Rhys *v.* Dare Valley Railway Company - - - - 93

CONDITIONS OF SALE—*Vendor and Purchaser—Sale under the Court—Rescinding Contract—Return of Deposit—Dividends produced by Invested Deposit.*] A sale in Chambers under a decree in a partition suit having been declared invalid on the ground that the sale took place before the certificate in answer to the inquiries directed by the decree was made:—*Held*, that the vendors could not avail themselves of a condition enabling them if unwilling, or unable for any reasonable cause to remove or comply with any objection or requisition by a purchaser, to rescind on repayment of the deposit without interest and without costs on either side; and that the discharged purchaser was entitled to the stock arising from his depost, which had been paid into Court and invested, with the dividends thereon, or the actual amount of deposit and the produce; with costs, charges, and expenses. Powell *v.* Powell 422

CONFLICT OF LAWS—Marriage settlement of alien in *England* - - - 334
See Alien's Settlement.

CONTRACT BY AGENT—*Vendor and Purchaser—Instructions to procure a Purchaser of an Estate—Estate Agent—Authority—Specific Performance.*] Upon a written request by an owner of freehold property to an estate agent to procure a purchaser for it and to advertise it at a certain price:—*Held*, that the estate agent had no authority to enter into an open contract for sale, and, *semble*, that he had no authority to enter into any contract for sale. Hamer *v.* Sharp - - - 108

CONTRACT NOT TO TENDER - - 426
See Agreement not to tender.

CONTRIBUTORY—Director's qualification 353
See Director's Qualification.

—— Infant transferee - - - 588
See Infant Transferee.

—— Set-off - - - - - 449
See Set-off in Winding-up.

CONVERSION—*Real Estate—Decree for Sale—Sale under Decree.*] Where, in an administration suit asking also for partition of real estate, the Court directed a sale, but before it was effected one of the parties interested in the real estate died:—*Held*, that the estate was sufficiently converted, and the estate having been sold, the share of the deceased beneficiary passed to his legal personal representative.—*Steed* v. *Preece* (Law Rep. 18 Eq. 192) followed. Arnold *v.* Dixon - 113

COPYRIGHT IN BOOK—*Use of Name—Employer and Agent—Injury to Employer's Property—Injunction.*] The Plaintiffs had purchased the copyright of and the right to use the name of the Defendant in the publication of a work called "*Beeton's Christmas Annual*," and the Defendant agreed to give his whole time to the service of the Plaintiffs, and not to engage in any other business:—*Held*, that the Defendant must be restrained from advertising a rival work. Ward *v.* Beeton. - - - - - 207

COPYRIGHT IN DESIGNS—*Catalogue—Piracy—Copyright Act* (5 & 6 *Vict. c.* 45)—*Costs.*] A tradesman who employs another for remuneration to compile a book of designs for him is himself entitled to copyright in the book. A book in the nature of an advertising catalogue may be the subject of copyright.—Plaintiff, a cemetery stone mason, employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, with scarcely any letter-press:—*Held*, that the Plaintiff had copyright in the book, and was entitled to an injunction to restrain the publication of designs copied from it.—*Cobbett* v. *Woodward* (Law Rep. 14 Eq. 407) commented upon—*Hotten* v. *Arthur* (1 H. & M. 603) followed. Grace *v.* Newman - - - - - 623

COSTS—Administration suit—Lapsed share of residue - - - - 77
See Marshalling. 1.

—— Appeal partially successful - - 253
See Costs of Appeal.

—— Arbitration - - - - 14
See Submission to Arbitration. 1.

—— Between party and party - - 473
See Taxation of Costs.

—— Lands Clauses Act—Redemption of land tax - - - - - 457
See Costs under Lands Clauses Act.

—— Partnership suit—Neglect to render accounts - - - - 343
See Partnership Accounts.

—— Party to fraudulent transaction - 171
See Bankrupt Defendant.

—— Taxation of - - - - 473
See Taxation of Costs.

COSTS OF APPEAL—*Bankruptcy—New Grounds.*] When an Appellant succeeds only upon a ground

COSTS OF APPEAL—*continued.*
not raised in the Court of first instance, he will have to pay the costs of the original hearing.—*Ex parte* HARRIS. *In re* JAMES - - 253

COSTS UNDER LANDS CLAUSES ACT—*Railway Company—Lands taken by Company—Application of Purchase-money—Redemption of Land Tax—Costs—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 3, 69, 80—*Statutes, Principles of Construction of.*] The costs of the application of the purchase-money of lands taken by a railway company in the redemption of land tax are payable by the company. *In re* BETHLEM HOSPITAL - - - - - - 457

COUNSEL'S FEES—Taxation of costs—Three counsel - - - - 473
See TAXATION OF COSTS.

COUNTY COURT APPEAL—Objection not raised in County Court - - - 547
See ACQUIESCENCE IN BUILDING.

COVENANT—To assign future patents - 462
See ASSIGNMENT OF PATENT.

—— To secure by will—Charity - - 453
See MORTMAIN.

—— Usual in mining lease - - - 591
See MINING LEASE.

CREDITOR—Action by—Debt incurred by fraud—Bankruptcy - - - 436
See INJUNCTION IN BANKRUPTCY.

—— Interest on debt—Coming in under decree
See INTEREST IN CREDITOR'S SUIT. [316

—— Petition in winding-up - - - 444
See WINDING-UP PETITION. 3.

—— Representation by—Prosecution of debtor [269
See PROSECUTION UNDER DEBTORS ACT.

CROSS-EXAMINATION—Counsel's fees - 473
See TAXATION OF COSTS.

CROWN—Title to foreshore - - - 558
See FORESHORE.

CUSTOMS ANNUITY AND BENEVOLENT FUND—*Provision for Claimants under Subscriber—Power of Subscriber to mortgage—Succession Duty—Predecessor and Successor—Mortgagor and Mortgagee—Succession Duty Act* (16 *& 17 Vict. c.* 51), *ss.* 2, 17.] The *Customs Annuity and Benevolent Fund* was established by Act of Parliament for the benefit of the widows, children, and other relatives of officers of the Customs, who are expected to subscribe an annual sum to it out of their salaries. By the Act directors were appointed with power to frame rules for the management of the fund, with a discretion to admit persons other than relatives of the subscribers as their nominees to the benefit of the fund. It was also enacted that, in order to insure to the widows of the subscribers, or any other claimants on the fund, the full benefit intended by the Act as an alimentary provision for the widows or other claimants entitled thereto, the interest of any widow or other claimant should not be assignable without the consent of the directors.—Rules were drawn up which provided that one-third of the portion payable on the death of a subscriber should be set aside for his widow, and that the remaining two-thirds should be subject to the directions of the subscriber (to be given by will, or codicil, or any instrument in writing

CUSTOMS ANNUITY AND BENEVOLENT FUND—*continued.*
signed by him in presence of an attesting witness and deposited with the directors during his life, or within three months after his death, and which instrument might at the option of the subscriber be made irrevocable), and should be applied or paid in any manner or proportion which he might think fit for the benefit of his widow, children, or relatives, or nominees who should have been duly admitted by the directors.—A subscriber to the fund, by instrument duly executed and deposited with the directors, irrevocably assigned two-thirds of the portion payable on his death to mortgagees to secure an advance made to him, and the mortgagees were duly admitted by the directors as his nominees:—*Held*, that the mortgage was valid as against the widow, children, and relations of the subscriber:—*Held*, also, that by virtue of sect. 17 of the *Succession Duty Act*, the interest of the mortgagees in the fund was not liable to succession duty.—*Attorney-General* v. *Abdy* (1 H. & C. 266) distinguished. *In re* MACLEAN'S TRUSTS [274

DAMAGES—Light and air—Not prayed by bill
See MANDATORY INJUNCTION. [616

DEBENTURE—*Bond — Equities between Obligor and Obligee—Recognition of Assignee.*] An insurance company having power to issue bonds and other securities, issued to *S.* a bond conditioned to be void on payment to him, his executors, administrators, and assigns, of £250 on a future day. The bond was assigned, for value, to *B.*, and notice of the assignment given at the office of the company and accepted, but the assignment was never registered. No inquiry was made as to the validity of the instrument before *B.* took the assignment. Before the bond fell due the company went into liquidation:—*Held*, on an application by *B.*'s executors to prove against the company, that the company had, by accepting notice of the assignment, precluded themselves from setting up against the assignee equities between them and the original obligor attaching to the instrument itself.—*Athenæum Life Assurance Society* v. *Pooley* (1 Giff. 102; 3 De G. & J. 294) observed upon. *In re* HERCULES INSURANCE COMPANY. BRUNTON'S CLAIM - - - - - - 302

DEBT—Payment of—Advancement clause 166
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—— Payment of—Lapsed share of residue - 77
See MARSHALLING. 1.

—— Petitioning creditor - - - 444
See WINDING-UP PETITION. 3.

DECREE—Sale by Court—Conversion - 113
See CONVERSION.

DEDICATION OF HIGHWAY—*User—Interruptions—Street—"Highway repairable by the Inhabitants at large"—General Highway Act*, 1835 (5 *& 6 Will.* 4, *c.* 50), *ss.* 23, 62—*Public Health Act*, 1848 (11 *& 12 Vict. c.* 63), *s.* 69—*Public Health Act* (1848) *Amendment Act*, 1852 (15 *& 16 Vict. c.* 42, *s.* 13.] In January, 1850, the owner in fee of a plot of land near a town demised the coals under it for six years, to *K.*, the owner in fee of the adjoining land; and in the lease was an agreement that a street, to be called *Union Street*, should within five years be made across the land under

DEDICATION OF HIGHWAY—*continued.*

which the coal lay and *K.'s* land; that a sewer should be made under such road; that the lessor and lessee should, at their own cost, construct and repair so much of the said road and sewer as should extend along their respective lands; and that the road should be used as a public road for all purposes for ever thereafter, and should be maintained by each of the parties so far as the same should extend over his land, until the same should be adopted by the surveyor of highways. The road and sewer were never made, and there was no dedication of a highway to the public by notice under the *Highway Act*. A brickfield, and afterwards (in 1851) a colliery, were opened on *K.'s* land, and gaps were opened through which access was obtained to the premises for carts and foot-passengers. In 1869 posts and chains were placed across one of the openings, but after a few months the chains were removed. In 1870 *K.'s* land was sold, and in 1871 conveyed to the Plaintiff in fee, and in 1872 the Local Board of Health called upon him to sewer and pave the alleged street under the *Public Health Act*, 1848:—*Held*, that the agreement in the expired list had been abandoned and could not be enforced; and that it did not amount to a dedication of a right of way to the public.—Circumstances which will be held to amount to an interruption sufficient to prevent a public right of way being acquired by user.—Public highways are generally repairable by the public; and an owner of land in the suburb of a town who allows the public to pass over his land, but who does not make a road at his own expense, nor propose to dedicate a highway to the public by notice under the *Highway Act*, nor undertake to keep the road in repair for twelve months with a view of throwing the future care and expense of the highway on the surveyor and the general rate under the same Act, is not liable to be compelled to sewer and pave the road as a street under the 69th section of the *Public Health Act*, 1848. Healey *v.* Corporation of Batley 375

DEMURRER—Winding-up petition - - 416
See Winding-up Petition. 2.

DEPOSIT—Money with merchant—Reduction into possession - - - 369
See Wife's Chose in Action.

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See "Securities for Money." [222

DEPUTY REGISTRAR—Bankruptcy—Authority of - - - - - - 52
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DESCRIPTION OF LEGATEE—"My housekeeper"—Mistake in name - - - 331
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DESIGNATION—Existing fund—Will - 501
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—— Specific—Marshalling assets - - 96
See Marshalling. 2.

DIRECTOR'S QUALIFICATION—*Company—Winding-up—Contributory.*] By a private Act of Parliament, which incorporated the *Companies Clauses Act*, 1845, it was enacted that *F.*, and certain other persons named, and all other persons who had already subscribed, or should thereafter subscribe, to the undertaking should be united into a company for the purposes therein mentioned; that the number of directors should be six; that the qualification of a director should be the possession in his own right of fifty shares; that *F.* and certain other persons should be the first directors of the company, and should continue in office until the first ordinary meeting, and that at that meeting the shareholders might either continue in office the directors appointed by the Act, or any of them, or might elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by the Act being, if qualified, eligible for re-election.—*F.* acted as a director until the first ordinary meeting, which was held in April, 1867. At that meeting he retired from office, and never afterwards had anything to do with the company. He never applied for any shares, nor were any ever allotted to him, nor was he ever placed on the register of shareholders. In May, 1874, the company was ordered to be wound up:—*Held*, that *F.* must be settled on the list of contributories for fifty shares. *In re* Teme Valley Railway Company. Forbes' Case - - - 353

DISCHARGE IN BANKRUPTCY—Close of liquidation—Resolution of creditors - 245
See Close of Liquidation.

DISCOVERY OF BANKRUPT'S PROPERTY—*Summons for Examination—Service—High Bailiff of County Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 96—*Bankruptcy Rules*, 1870, *rr.* 58, 166, 167, 171.] The Judge of a County Court has a discretion to direct whether a summons for examination under sect. 96 of the *Bankruptcy Act*, 1869, shall be served by the solicitor of the person applying for it, or by the High Bailiff of the Court. *Ex parte* Bolland. *In re* Holden - 131

DISTRESS AFTER WINDING-UP—*Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.] A distress levied by a creditor of a company in course of winding-up by or under the supervision of the Court, after the commencement of the winding-up, is void.—*Secus* if the distress is levied by a party who cannot prove in the winding-up.—*In re Exhall Coal Mining Company* (4 D. J. & S.) 377) and *In re Lundy Granite Company* (Law Rep. 6 Ch. 462) discussed. *In re* Traders' North Staffordshire Carrying Company. *Ex parte* North Staffordshire Railway Company - 60

DIVERSION OF WATER—*Riparian Owner—Part of Stream—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 6—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 18, 84, 85, 68.] The abstraction by a waterworks company of water from a stream for the purposes of the undertaking does not, under the 6th section of the *Waterworks Clauses Act*, 1847, entitle a riparian owner below to require the company to treat for the purchase of his portion of the stream, but only entitles such riparian owner to claim compensation under the 68th section of the *Lands Clauses Consolidation Act*, 1845, for the stream being injuriously affected. Bush *v.* Trowbridge Waterworks Company - - - - - - - 291

DIVORCE—Foreign—*Turkey* - - 334
See Alien's Settlement.

DOCUMENTS—Production of - - 33
See Production of Documents.

DOWER — *Freebench — General Devise of Real Estate—Devise for Benefit of Widow—Dower Act* (3 & 4 *Will.* 4, *c.* 105), *ss.* 4, 9—*Wills Acts* (1 *Vict. c.* 26), *ss.* 2, 3.] A testator, by his will (made in 1861), devised all his real estate and bequeathed his personal estate to trustees upon trusts for sale and conversion; and he directed his trustees, out of the proceeds of such sales, to pay his debts and funeral and testamentary expenses, and to invest the surplus as therein mentioned, and out of the income of the investments to pay an annuity to his widow, and subject to such annuity to stand possessed of the investments upon trusts for the benefit of his children. The testator (who had married after the *Dower Act* came into operation) died entitled to freeholds and copyholds which he had purchased. The conveyances of the freeholds were not made to uses to bar dower, nor did they contain any declaration against dower. The copyholds had not been surrendered to the uses of his will:—*Held*, that the widow was barred of any right to dower both by sect. 4 and by sect. 9 of the *Dower Act*:—*Held*, also, that she was deprived of any right to freebench by virtue of sect. 3 of the *Wills Act.*—*Dicta* in *Rowland* v. *Cuthbertson* (Law Rep. 8 Eq. 466) dissented from. Lacey *v.* Hill. Leney *v.* Hill - - - - 346

DRAWINGS—Charges for - - - 473
See Taxation of Costs.

EAST INDIA COMPANY—Rights of—Kingdom of *Oudh* - - - - 509
See Sovereign Act of State.

EJUSDEM GENERIS—Doctrine of—Advancement clause - - - - - 166
See Advancement. 1.

ENJOYMENT IN SPECIE—*Will—Tenant for Life and Remainderman—Leasehold Collieries—Profits, how to be enjoyed.*] A testator, seised of real estate, and possessed of leasehold collieries which he was working, by his will devised all his real estate, "and also" all his leasehold estates, "and" all his "goods, chattels, and credits" to three trustees, so that they should have the legal estate, upon trust, as to one moiety for his married daughter for life (not to her separate use), then to her husband (one of the trustees) for life, then to her first son absolutely; and as to the other moiety for his only other child, an unmarried daughter, for her separate use for life (without restraint upon anticipation), then to her children, and in default (which happened), upon the trusts of the other moiety. He empowered the married daughter, and her husband, and also the unmarried daughter, to appoint portions to be raised and paid out of his "said real and personal estates respectively." He empowered the unmarried daughter to appoint any part not exceeding one half of the "rents, issues, and profits, interest, dividends, and annual income" of her moiety during the lifetime of any husband for his use. The trustees were empowered to "levy and raise and pay and apply" for advancement any part or parts of the moieties; and to pay and apply such part as they should think fit of "the income and annual produce" for maintenance. He gave power to the trustees to lease "all or any part" of his "said freehold or leasehold estates" for twenty-one years; to "alter, vary and transpose" the "state of investment of the property," provided that the same should consist of "real estate, securities upon real estate, or shares in the public funds," for which purpose, and also for the purpose of "raising" such sums of money as it might become "necessary to raise in pursuance of the powers," to "sell and convert into money" all or any part of the "said trust estates," or to mortgage the same. He then empowered the trustees, "in case they shall deem it beneficial so to do," to continue the collieries and either to increase or abridge the business thereof, and all losses, costs, charges and expenses of carrying on the business should be "borne, paid, and defrayed" out of his "real and personal estate," and also to procure any lease of the collieries to be renewed, and to continue the business after such renewal.—The testator died in 1834. The son-in-law was the sole proving executor, and was the only acting trustee until the marriage of the unmarried daughter in 1835, shortly after which date her husband was appointed co-trustee. The trustees continued and enlarged the colliery business for thirty-seven years, taking leases of additional collieries, making large profits, and greatly increasing the value of the plant.—Upon suit by the eldest son of the elder daughter, claiming to have the profits over £4 per cent. on the value of the collieries at the death of the testator capitalized, and made to form part of the estate:—*Held*, that there were sufficient indications of intention in the will to exclude the operation of the rule in *Howe* v. *Lord Dartmouth* (7 Ves. 137), and that the tenants for life were entitled to the enjoyment in specie of the produce of all the collieries. Thursby *v.* Thursby - - - - 395

EQUITABLE ASSIGNMENT—Cheque - 74
See Cheque.

EQUITY TO A SETTLEMENT—Separation deed—Return to cohabitation - - 539
See Separation Deed.

ESTATE AGENT—Instructions to procure a purchaser - - - - 108
See Contract by Agent.

ESTOPPEL—Obligor of bond—Invalidity - 302
See Debenture.

EVIDENCE—Adjudication of bankruptcy - 52
See Petition for Adjudication. 1.

—— Appeal—Not used at original hearing 253
See Bankruptcy Appeal. 1.

—— Marriage—Reputation - - 98
See Evidence of Marriage.

—— Title to foreshore - - - 558
See Foreshore.

EVIDENCE OF MARRIAGE—*Presumed Marriage —Divided Repute—Preponderance of Evidence—Conduct of Witnesses.*] A marriage may be established by preponderating repute and by conduct even though the repute be divided. Lyle *v.* Ellwood - - - - - 98

EXAMINATION—Bankruptcy—Service of summons - - - - - 131
See Discovery of Bankrupt's Property.

EXECUTION CREDITOR—*Trade Debtor—Seizure and Sale—Notice of prior Act of Bankruptcy—Execution levied after Sale under prior Execution by the same Creditor—Bankruptcy Act*, 1869, *ss.* 6 (*sub-s.* 5), 11, 87, 95.] A creditor issued execution against a trader for a debt above £50. After the goods seized by the sheriff had been sold, the same creditor issued another execution against the debtor for another debt above £50. The goods seized under the second execution were sold, and the money produced by the sale was paid over to the creditor, the sheriff having had no notice within fourteen days from the sale of any bankruptcy petition against the debtor. Afterwards the debtor was adjudicated a bankrupt upon the act of bankruptcy committed by the seizure and sale under the first execution. The money produced by the first sale was not paid to the creditor till after the sale under the second execution:—*Held*, that, though it was not proved that the creditor had, when the sale took place under the second execution, any actual knowledge that the sale had been made under the first, he must be deemed to have had notice of the proceedings under his own execution, and must therefore refund the money produced by the second execution. *Ex parte* Dawes. *In re* Husband - - 438

—— Leave to proceed after winding-up - 202
See Leave to proceed after Winding-up.

EXECUTOR—Right of retainer - - 21
See Retainer by Executor.

FIRE INSURANCE—Misdescription of buildings
See Misstatement in Policy. [485

FORECLOSURE SUIT—*Pro confesso*—Service of decree - - - 48, 49, n.
See Pro Confesso. 1, 2.

FOREIGN DIVORCE—Alien and British subject
See Alien's Settlement. [334

FOREIGN GOVERNMENT—Loan by - 33
See Production of Documents.

FOREIGN JUDGMENT—*Proof against Estate of Deceased Debtor—Administration in England.*] Where judgment had been obtained in a foreign Court by the foreign administrator of a creditor against an English debtor who had since died, and whose estate was being administered in *England*:—*Held*, that the foreign administrator could prove without taking out English administration to his intestate. *In re* Macnichol. Macnichol *v.* Macnichol - - 81

FORESHORE—*Trespasser—Possessory Title—Adverse Title of Crown—Evidence.*] A possessory title sufficient against a trespasser may be established by persons claiming foreshore, without producing evidence sufficient to displace the title of the Crown. In a suit against a trespasser by persons claiming title to foreshore and giving evidence of acts of ownership in support of their title, it is not open to the Defendant to prove any acts of ownership by the Crown except such as can be shewn to have been done with the knowledge of the Plaintiffs. Queen *Elizabeth*, by royal

FORESHORE—*continued.*
letters patent, granted to the Corporation of *Hastings* certain lands in and about *Hastings*, which were liable to forfeiture, as being affected by superstitious uses, and had been previously concealed, and "all that her parcel of land and her hereditaments called the *Stone Beache* with the appurtenances in *Hastings* aforesaid, in her said county of *Sussex*, and all messuages, houses, edifices, and buildings whatsoever, with their appurtenances, in and upon the aforesaid parcel of land called the *Stone Beache*":—*Held*, (1) that there was no presumption from the language of the grant against the extension of the grant to the part of the beach below high-water mark; (2) that inasmuch as it appeared that the expression "*Stone Beach*" was now applied to the entire part of the beach covered with shingle, which extended below as well as above high-water mark, and that the inferior boundary called the "*Stone's Foot*," was liable to vary according to the state of the wind and tide, the whole present foreshore, whether now shingle or sand, must, as against a person not claiming any title in himself, be presumed to be included in the grant.—Injunction granted accordingly to restrain the deposit of earth on the sand below the *Stone's Foot*.
Corporation of Hastings *v.* Ivall - 558

FOREST—Waste of - - - - 134
See Waste of Forest.

FORFEITURE CLAUSE—Mining lease—Usual clauses - - - - 591
See Mining Lease.

FRAUD—Debt incurred by—Bankruptcy—Action by creditor - - - - 436
See Injunction in Bankruptcy.

FRAUDS, STATUTE OF—*Part Performance—Possession—Agreement to allow Occupation for Life—Making good Representation.*] The *Statute of Frauds* cannot be pleaded to a verbal agreement to allow the occupation of a leasehold house for life on payment merely of ground rent, rates, and taxes, if there has been a part performance by possession under the agreement and the agreement has affected the mode of living of the occupying party.—*Loffus* v. *Maw* (3 Giff. 592) approved of.
Coles *v.* Pilkington - - - - 174

2. —— *Promissory Note—Verbal Promise of Indemnity—Liability undertaken at the Request of Another.*] *A.*, at the request of and on a verbal offer by *B.* to indemnify him against loss, joined with *C.* in a joint and several promissory note which he was afterwards compelled to pay:—*Held*, that the offer to indemnify *A.* was not an agreement within the *Statute of Frauds*, and, therefore, need not be in writing, and that *A.*, having afterwards become the executor of *B.*, was entitled to retain the amount paid by him on the note as a debt due to him from *B.*'s estate.
Wildes *v.* Dudlow - - - - 198

FRAUDULENT DEBTOR—Prosecution under Debtors Act - - - - 269
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FREEBENCH - - - - - 346
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GENERAL ORDER IN CHANCERY, 1841, Rule 10
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GENERAL RULES IN BANKRUPTCY, 1870—
Rules 1, 3, 36, 37 - - - 52
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—— Rules 58, 166, 167, 171 - - 131
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—— Rules 61, 65, 266 - - - 441
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—— Rules 139, 303–305 - - - 245
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—— Rule 143 - - - - 266
See Bankruptcy Appeal. 2.
—— Rules 279, 285, 288, 295 - - 256
See Joint and Separate Estates.
—— Rules 311, 313 - - - - 261
See Trustee in Composition.

GIFT AT TWENTY-FIVE—*Will—Construction—Vesting—Gift of Intermediate Income for Maintenance—Discretionary Power—Remoteness.*] A testator directed his trustees to raise a sum of £15,000, and after the determination of several prior life interests given to *T.* and his widow to divide and transfer one-fifth of the fund to and amongst the children of *T.* equally as and when they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof as the trustees for the time being might think fit, for his and her maintenance and education until such share should become payable as aforesaid; but if *T.* should leave no children him surviving, or if he should, and they should all die before attaining the age of twenty-one years, then to pay and transfer the said fifth part to the other persons therein referred to:—*Held*, that the children of *T.* took vested interests, and consequently that the gift to them was not void for remoteness.—*Pulsford* v. *Hunter* (3 Bro. C. C. 416) and *In re Ashmore's Trusts* (Law Rep. 9 Eq. 99) dissented from, and not followed. Fox *v.* Fox - 286

GIFT PER CAPITA OR PER STIRPES—*Will—Construction—Gift to Children and Grandchildren.*] A testator gave the residue of his real and personal estate unto his two sons and three daughters by name, and to the children born of the body of his daughter *E.*, deceased, and the children born of the body of his daughter *L.*, deceased, to be divided among them in equal shares and proportions. One of the deceased daughters had five children, and the other had two children:—*Held*, that the residue must be divided in twelfths between the five surviving children of the testator and the seven children, *per capita*, of the two deceased daughters. Payne *v.* Webb - 26

HEIR—Agreement not to contest will - 327
See Agreement not to contest Will.

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HIGHWAY—Dedication of - - 375
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HUSBAND AND WIFE—Alien married to British subject—Foreign divorce - 334
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—— Restraint of marriage - - 631
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—— Separate estate—Married Women's Property Act - - - - - - 295
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—— Wife's *chose in action*—Reduction into possession - - - - 369
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—— Will of married woman - - 467
See Administration Summons.

INCLOSURE—Waste of forest - - 134
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INCOMPLETE GIFT—*Intended Transfer of Property—Declaration of Trust.*] Testator, who was the owner of a share in a colliery, on the 11th of February, 1865, wrote to the Plaintiff, his daughter, as follows:—"I have another present to make shortly, one share of *Ryhope Colliery* . . . . and you may now consider that you have this yourself from 2nd January to receive dividends upon. I am also giving to *Sarah* one, the same." On the 17th he attended a meeting of shareholders in the colliery, and signed the following entry in the minute book:—"That Mr. *N.'s* (his own) "proposition of transferring two of his shares to the parties undernamed be agreed to, viz." (the Plaintiff and her sister). It was admitted that this signature was not sufficient, according to the regulations of the deed of partnership, to pass the property in the shares. On the 25th of February he again wrote to the Plaintiff:—"I have arranged and made all right with the shares for you and *Sarah*, and dividends will be sent from 2nd January." On the 4th of March the testator wrote to the Plaintiff:—"Next meeting (private) we will be enabled to make another dividend, when you and *Sarah* will be informed." On the 16th of March he sent the Plaintiff a cheque for the first dividend, with a letter thus:—"Herewith I enclose cheque for £37 10*s.*, which you can receive at the bank . . . . first dividend made this day." On the 18th of March he again wrote to the Plaintiff, as follows:—"I have yours in reply to the receipt of dividend—long may you live to enjoy it;" and in the same letter, after referring to the meeting of the 17th of January, he further said:—"Well, when I got in, I openly at once asked the question in the presence of" (four persons whom he named), "I was about to give to my two daughters one share each, and which is the way to do it? They were all pleased. It was entered in the minutes of the book":—*Held*, that the above expressions in letters, signature of minute, and gift of dividend, did not amount to a declaration by the testator, nor to proof of an intention and determination on his part, that he would hold the shares for the Plaintiff; but that the testator, having the desire and intention that she should, from and after the 11th of February, 1865, have the shares as her property, failed to fulfil that desire and complete that intention. Heartley *v.* Nicholson - 233

INCREASE OF CAPITAL OF COMPANY—*Company — Memorandum of Association—Articles of Association — Powers of Company — Increase of Capital—Preference Shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89). *s.* 12.] If the memorandum and articles of association of a company are silent on the subject, it is an implied condition that the shareholders are entitled to rank equally as regards dividend, without preference or priority between themselves; but such implication will be rebutted if the articles of association, contemporaneous with the memorandum, contain clear provisions as to the preference or priority of classes of shares.—The memorandum of association of a company incorporated under the *Companies Act*, 1862, declared that the capital was £2.700,000, divided into 135,000 shares of £20 each. It was provided by the articles of association that the directors might, with the sanction of a special resolution of the company previously given in general meeting, increase the capital by the issue of new shares, such increase of capital to be made in such manner, to such amount, and to be with and subject to such rules, regulations, privileges, and conditions as the company in general meeting should think fit:—*Held*, on demurrer, that special resolutions authorizing an increase of the capital by the issuing of preferred shares were not in excess of the powers of the company.—*Hutton* v. *Scarborough Cliff Hotel Company* (2 Dr. & Sm. 514, 521; 4 D. J. & S. 672) distinguished. Harrison *v.* Mexican Railway Company - - - - 358

INDEMNITY—Agreement for—Statute of Frauds
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INDIA—Secretary of State for—Kingdom of *Oudh* —Jurisdiction - - - 509
See Sovereign Act of State.

INFANT TRANSFEREE — *Company — Winding-up—Contributory.*] *W. A. R.* purchased shares in a company, and paid for them, but took a receipt and signed the transfer deed as transferee in the name of *F. W. R.*, his son: and the shares were registered in the name of *F. W. R.*, who was then and still was a minor.—Upon the company being wound up, and the name of *F. W. R.* being placed on the list of contributories:—*Held*, that the register of members and list of contributories must be rectified by substituting the name of *W. A. R.* for that of *F. W. R.* on both. *In re* Imperial Mercantile Credit Association. Richardson's Case - - - - 588

INJUNCTION—Action on policy of insurance 607
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—— Agreement not to tender - - 426
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—— Bankruptcy—Debt increased by fraud 436
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—— Winding-up petition - - - 182
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INJUNCTION IN BANKRUPTCY—*Composition—Debt incurred by Fraud—Action by defrauded Creditor for Balance—Jurisdiction of the Court of Bankruptcy—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 15—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] A creditor who alleges that his debt has been contracted fraudulently by his debtor may, after receiving a composition from him under sect. 126 of the *Bankruptcy Act*, 1869, commence an action against him for the balance of the debt, without being obliged to prove to the Court of Bankruptcy a *primâ facie* case of fraud.—The Court of Bankruptcy has no jurisdiction to interfere with such an action. *Ex parte* Halford. *In re* Jacobs - - - - - 436

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—— Calls on shares—Tenant for life - 69
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See Compulsory Powers. 2.

—— Creditor's suit—General Order, 1841, r. 10
See Interest in Creditor's Suit. [316

INTEREST IN CREDITOR'S SUIT—*Administration—Coming in under the Decree—General Order*, 1841, *r.* 10.] The General Order of 1841, allowing interest on the debts of creditors who come in and establish their debts under a decree in a suit, does not apply to a creditor who, though Plaintiff in a suit in which a decree was taken before the date of the General Order, did not technically come in under the decree till afterwards. Wheeler *v.* Gill - - - - - 316

INVALIDITY—Agreement not to tender - 426
See Agreement not to tender.

—— Voluntary settlement—Bankruptcy - 433
See Voluntary Settlement.

IRREPARABLE INJURY — *Demurrer — Mine—Injunction—Use of Property—Negligence—Water.*] A bill averred that a mine which the Defendants threatened to work could not be worked without letting in a river and flooding Defendants' mine, and through that the Plaintiff's mine, and prayed an injunction.—Demurrer overruled. Crompton *v.* Lea - - - - - - 115

ISSUES AT LAW—Patent suit - - 229
See Patent Suit. 3.

JOINT AND SEPARATE ESTATES—*Liquidation—Composition—Partners—Powers of Trustee of Joint Estate over Separate Estate—Locus Standi to oppose Registration of Resolutions—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 104—*Bankruptcy Rules*, 1870, *rr.* 279, 285, 288, 295.] On the appointment of a trustee of the joint estate under a liquidation petition filed by partners, the separate estate of each of the partners, as well as their joint estate, vests in him.—The separate creditors of one of the partners, therefore, though they may afterwards resolve to accept a composition in satisfaction of their separate debts, cannot vest the separate estate in any other trustee. But it is the

JOINT AND SEPARATE ESTATES—*continued.*
duty of the trustee appointed by the joint creditors to administer the separate estate in accordance with the resolutions of the separate creditors, and then to carry over the surplus to the joint estate.—The joint creditors of two partners resolved upon a liquidation by arrangement, and appointed a trustee. Afterwards, the separate creditors of one of the partners resolved to accept a composition, and that the debtor should assign his separate estate to a trustee (not the same person as the trustee chosen by the joint creditors) to secure the payment of the composition:—*Held*, that the latter part of this resolution was *ultrà vires*, and that the trustee of the joint estate had a *locus standi* to oppose its registration. *Ex parte* Philps. *In re* Moore - - - - - - 256

JUDGMENT—Foreign - - - 81
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JURISDICTION — Composition with creditors—Powers of trustee - - - 261
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—— Partition suit—Sale - - - 595
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—— Solicitor—Negligence - - - 627
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—— Sovereign act of State—East India Company—Kingdom of *Oudh* - - 509
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—— Winding-up petition—Injunction - 182
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—— Mine—Mining clauses - - 591
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LEASEHOLD—Enjoyment in specie - 395
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—— Investment of purchase-money — Lands Clauses Act—Charity - - 180
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LEAVE TO PROCEED AFTER WINDING-UP—*Company — Winding-up — Judgment—Liberty to issue Execution refused—Companies Act*, 1862, *ss.* 87, 163.] A creditor of a company, whose debt was incurred by giving acceptances on their behalf, having obtained judgment against the company after the presentation of a petition, but before the order for winding up, was refused leave to enforce execution upon his judgment, although the Court was of opinion that he had been hardly dealt with by the company; but the costs of the application and of the action were given after the costs of the official liquidator. *In re* Dimson's Estate Fire-Clay Company - 202

LEGACY, SPECIFIC OR DEMONSTRATIVE—*Will—Construction.*] A testatrix having £3000 *East India* Debenture Bonds gave a legacy by the following description:—"The sum of £3000 invested in Indian security":—*Held*, not a specific legacy, and not liable to ademption. Mytton *v.* Mytton - - - - - - 30

LEGACY, SPECIFIC OR GENERAL—*Will—Designation of Existing Fund—"£4500 Money in the Funds"—Bequest of the Interest of a Fund—"Any small Balance remaining in the Bank."*] Gift by will in the words, "I give to my dear sister *A. M. D.* the interest of £4500 money in the funds for her absolute use and benefit;" followed by specific gifts to the same legatee and the words "and at her decease to *M. A. H.*, the funded property to *H. Y.*" The testatrix had, at the date of her will, an absolute interest in about £4000 consols in the names of trustees:—*Held*, a specific gift of the £4000 consols for the benefit of the sister for life, with a gift over to *H. Y.* absolutely.—Gift of "any small balance remaining in the bank after payment of my funeral expenses."—The testatrix had, at the date of the will, a balance of £480 at her bankers, which had increased to the amount of £1373 0*s.* 10*d.* at her death:—*Held*, that the whole balance passed. Page *v.* Young - - - - - 501

LEX LOCI CONTRACTUS—Marriage settlement of alien in *England* - - - 334
See Alien's Settlement.

LIEN FOR CALLS—*Settlement — Tenant for Life—Shares—Calls—Advances by Tenant for Life—Lien—Interest.*] A tenant for life under a settlement comprising shares has a lien on the shares for repayment with interest of advances made at the request of the trustees for the purpose of paying calls on the shares, even though the trustees might, by exercising powers vested in them, have raised the necessary money otherwise. Todd *v.* Moorhouse - - - - - - 69

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MAINTENANCE—Intermediate—Income 286
See Gift at Twenty-five.

MANDATORY INJUNCTION—*Ancient Lights—Injury nearly completed before Bill filed—Inquiry as to Damages.*] On a bill for injunction to restrain the completion and continuance of a building seriously obstructing ancient lights, it appeared that the building was almost completed before bill filed; that the Plaintiff had, before the commencement of the works, information that some building was proposed, and that she was

MANDATORY INJUNCTION—*continued.*
abroad during the actual building, and had done nothing amounting to acquiescence:—*Held*, that a mandatory injunction could not be granted; and an inquiry as to damages was directed, though not prayed by the bill. Lady Stanley of Alderley *v.* Earl of Shrewsbury - - 616

MANOR—Lord of—Waste of forest - 134
See Waste of Forest.

MANUFACTORY—Purchase by railway company—Notice to treat - - - 83
See Compulsory Powers. 1.

MARRIAGE—Evidence of—Reputation - 98
See Evidence of Marriage.

—— Restraint of - - - - 631
See Restraint of Marriage.

MARRIED WOMEN'S PROPERTY ACT—*Separate Use—Power to transfer Stock—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *ss.* 3, 7, 11—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 22.] The *Married Women's Property Act*, 1870, does not empower a married woman, entitled under sect. 7 to a sum of stock for her separate use, to transfer such stock without the concurrence of her husband, unless and until the stock has been placed, under sect. 3, in her name as a married woman entitled for her separate use.—A sum of consols was standing in the name of three persons, one of whom was a married woman, who had been deserted by her husband, and was entitled beneficially to the stock under sect. 7 of the *Married Women's Property Act*, 1870. Those persons applied to the *Bank of England* to be permitted to transfer the stock without the concurrence of the husband of the married woman; and the bank having refused:—*Held*, that the bank could not be compelled to permit such a transfer. Howard *v.* Bank of England - - 295

MARSHALLING—*Administration Suit—Expenses and Debts—Lapsed Share of Residuary Personal Estate.*] A testatrix, being possessed of personal estate, gave to her niece, subject to all legacies and bequests, the residue of her estate up to the end of the year 1855; and she gave all accumulations from that date equally between her great-nephews. The share of residue to the niece lapsed by her death in the lifetime of the testatrix:—*Held*, that the only residue was that given to the niece, which lapsed, and was liable to all the expenses and debts.—*Semble*, that wherever there is a lapsed share of residuary estate, whether personal or real, the lapsed share is the primary fund for payment of debts and expenses. Gowan *v.* Broughton - - - - - 77

2. —— *Administration—Costs—Specific and Residuary Devisee.*] Where the residuary personalty, after payment of testator's debts, proved insufficient to pay the costs of a suit to administer the trusts of his will:—*Held*, that the deficiency must be borne by the specifically bequeathed personalty, the specifically devised realty and the residuary realty, rateably according to value.—*Bagot* v. *Legge* (2 Dr. & Sm. 259) considered.—*Lancefield* v. *Iggulden* (Law Rep. 17 Eq. 556) not followed. Jackson *v.* Pease - - 96

MEMORANDUM OF ASSOCIATION—Increase of capital - - - - 358
See Increase of Capital of Company.

MINE—Flooding neighbouring mine—Injunction - - - - - 115
See Irreparable Injury.

—— Lease of - - - - 591
See Mining Lease.

MINING LEASE—*Usual and Customary Mining Clauses — Clause of Forfeiture on Bankruptcy.*] A memorandum of agreement for a lease of coal mines in *North Staffordshire* provided that the lease was to have all usual and customary mining clauses:—*Held*, that this provision did not entitle the lessor to the insertion in the lease of a clause of forfeiture thereof in the event of the lessee becoming bankrupt or compromising with his creditors for less than 20*s.* in the pound, or of a clause in restraint of assignment. Hodgkinson *v.* Crowe - - - - - - 591

MISDESCRIPTION OF BUILDINGS - 485
See Misstatement in Policy.

MISSTATEMENT IN POLICY—*Fire Insurance—Agent of Company—Misdescription of Buildings—Materiality of Misstatement.*] A fire insurance was effected in respect of certain property through an agent named *Donald*, who inspected the premises. One condition of the policy was, that any material misdescription of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate but with tarred felt. The company alleged that *Donald* was not their agent, but the agent of the insured; and that the misdescription rendered the policy void:—*Held*, that the misdescription was immaterial, and not sufficient to vitiate the policy; but that if material, it was made by *Donald* as the agent of the insurance company, and the insured were not responsible for it. *In re* Universal Non-Tariff Fire Insurance Company. Forbes & Co.'s Claim - 485

MISTAKE IN WILL—*Construction—Bequest to "My Housekeeper"—Error in Christian Name.*] Testator, by will dated in 1874, shortly before his death, bequeathed to his executors a sum of New £3 per Cent. Annuities, upon trust to sell the same and apply the proceeds in the purchase of a life annuity in "the name and for the benefit of my housekeeper, *M. R.*, whether living in my service at the time of my death or not." *M. R.* had left the testator's service six or seven years before, and married in 1871, and her sister, *E. R.*, had been since 1870, and was at the time of the testator's death, in his service as his housekeeper:—*Held*, that the primary description of the legatee, "my housekeeper,' and not the name, was in this case the guide to the testator's intention, and that *E. R.* was entitled to the fund. *In re* Nunn's Trusts - - - 331

MONEY—Securities for—Bequest of - 222
See "Securities for Money."

MORTGAGE—Payment of prior—Bill of sale 253
See Satisfaction of Bill of Sale.

—— Subscriber to Customs Annuity and Benevolent Fund - - - 274
See Customs Annuity and Benevolent Fund.

MORTMAIN—*Charity*—9 *Geo.* 2, *c.* 36—*Voluntary Covenant—Impure Personalty—Abatement.*] A voluntary covenant to secure by will the payment of a sum of money to be applied for charitable purposes cannot be satisfied out of the impure personalty of the covenantor; and the debt created by the covenant must, like a legacy, abate in the proportion of the impure to the pure personalty. Fox *v.* Lownds - - - 453

MULTIFARIOUSNESS—*Demurrer — Administration Suit.*] Where the Plaintiffs have a common interest in all the matters comprised in a suit, the objection of a Defendant that he is not concerned in the whole subject-matter is one the allowance of which is in the discretion of the Court, which will be guided by considerations of convenience under the particular circumstances of the case.—The administratrix of an intestate assigned a share in a business forming part of the intestate's estate to trustees to pay the intestate's debts, and then for her, and subsequently assigned her own beneficial interest in the share to the same trustees on certain trusts. The next of kin, who were also co-heiresses of the intestate and interested under his marriage settlement, filed a bill against the administratrix, the assignees in trust of the share in the business, and the trustees of the settlement, for administration of his real and personal estate, and of the trusts of the settlement. The assignees in trust of the share in the business demurred for multifariousness:—*Held*, that the various interests of the infants could be most conveniently ascertained in one suit; and, consequently, that the demurrer must be overruled. Coates *v.* Legard - - - - 56

NAME—Legatee—Mistake in will - - 331
See Mistake in Will.

NATIONAL DEBT COMMISSIONERS—*Practice—Re-transfer of Stock—Form of Order—National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 54, 55.] Where stock in the name of a trustee holding upon trust for a beneficiary has been transferred to the National Debt Commissioners, the re-transfer will be ordered to be made, not to the beneficiary, but to the trustee. *Ex parte* Mary Jameson - - - - - 430

NEGLIGENCE—Irreparable injury—Injunction—Mine - - - - - 115
See Irreparable Injury.

—— Solicitor - - - - - 627
See Negligence of Solicitor.

NEGLIGENCE OF SOLICITOR—*Jurisdiction—Mortgage.*] A bill will not lie against a solicitor for negligence in investigating a title.—*Chapman* v. *Chapman* (Law Rep. 9 Eq. 276) observed upon. British Mutual Investment Company *v.* Cobbold - - - - - - 627

NEXT OF KIN—Agreement not to contest will [327
See Agreement not to contest Will.

NOTICE—Act of bankruptcy - - 438
See Execution Creditor.

—— Act of bankruptcy - - - 253
See Satisfaction of Bill of Sale.

—— Before building—Obstruction of ancient lights - - - - 616
See Mandatory Injunction.

NOTICE—*continued.*

—— Foreign divorce - - - - 334
See Alien's Settlement.

—— Petition for adjudication - - 441
See Petition for Adjudication. 2.

—— To treat—Withdrawal of - - - 83
See Compulsory Powers. 1.

OBJECTIONS TO PATENT—Particulars of - 72
See Patent Suit. 1.

OBLIGOR—Debenture of company—Assignment
See Debenture. [302

ORDER AND DISPOSITION—*Bill of Sale—Reputed Ownership—Possession of Sheriff under Execution—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.] On the 2nd of May a bill of sale of chattels was executed, and it was afterwards duly registered. The mortgagee did not demand possession of the goods until the 15th of June. The goods had been seized on the 5th of June by the sheriff under an execution issued by another creditor, and on the 13th of June the debtor had filed a liquidation petition. The sheriff remained in possession till the 20th of June:—*Held*, that the sheriff's possession, being wrongful as against the mortgagee, did not prevent the goods from being in the order or disposition of the debtor at the commencement of the liquidation, and that they consequently passed to the trustee.—Observations on *Barrow* v. *Bell* (5 E. & B. 540) and *Ex parte Foss* (2 De G. & J. 230). *Ex parte* Edey. *In re* Cuthbertson - 264

OUDH—Kingdom of—Act of State - - 509
See Sovereign Act of State.

PART PERFORMANCE—Specific performance—Outlay on property - - 547
See Acquiescence in Building.

—— Statute of Frauds - - - 174
See Frauds, Statute of. 1.

PARTICULARS OF BREACHES—Patent suit 72, [229
See Patent Suit. 1, 3.

PARTIES—Bankrupt Defendant - - 171
See Bankrupt Defendant.

—— Contract not to tender - - - 426
See Agreement not to tender.

—— Fraudulent transaction—Agent - 171
See Bankrupt Defendant.

PARTITION SUIT—*Partition Act*, 1868—*Jurisdiction—Sale—Retrospective Operation.*] The *Partition Act*, 1868, s. 4, though retrospective in its operation, does not enable the Court to direct a sale under a decree for partition made before the Act, but not carried into operation at the time of passing the Act.—The usual decree was made in a partition suit in 1864, with liberty for any of the parties before the commission should be issued "to carry in proposals for a sale or for a partition before the Judge in Chambers":—*Held*, that although a commission had never been issued, the Court had no jurisdiction, without the consent of all parties interested, now to direct a sale instead of a partition. Pryor *v.* Pryor - 595

PARTNERSHIP—Articles—Arbitration clause [14, 599
See Submission to Arbitration. 1, 2.

PARTNERSHIP—*continued.*

—— Liquidation by arrangement—Joint and separate estate - - - 256
See Joint and Separate Estates.

—— Surviving partner—Neglect to render account - - - - 343
See Partnership Accounts.

PARTNERSHIP ACCOUNTS—*Suit by Executors of Deceased Partner—Conduct of Surviving Partner—Neglect to render Account—Costs up to Hearing.*] In a suit by the executors of a deceased partner against a surviving partner who was bound under the articles to pay them annually half the profits of the business, the bill alleging that no accounts had been rendered, though application had been made, for some years, but not alleging that anything was due from the Defendant, and praying for an account and for the winding-up of the partnership—the Defendant having by his answer admitted the allegations in the bill and submitted to render an account without alleging that nothing was due:—*Held*, that the Defendant must pay the costs up to the hearing. Norton *v.* Russell - - - - - - 343

PATENT—Covenant to assign - - 462
See Assignment of Patent.

PATENT SUIT—*Practice—Delivery of Particulars of Breaches and Objections*—15 & 16 *Vict. c.* 83, *s.* 41.] The practice prescribed by the statute 15 & 16 Vict. c. 83, s. 41, with respect to actions at law for the infringement of letters patent ought to be followed in suits in equity as closely as circumstances will permit.—A Plaintiff in a patent suit ought either to state in his bill the particulars of the breaches complained of, or to deliver along with his bill a written statement of such particulars, which statement need not be filed. A Defendant in a patent suit ought to set forth in his answer the particulars of any objections on which he relies. Finnegan *v.* James 72

2. —— *Practice—Inspection.*] An order will not be made on the application of the Plaintiff, in a suit to restrain an alleged infringement of his patent, for inspection of the Defendants' works and machinery unless the Court is satisfied that the inspection is essential to enable the Plaintiff to prove his case. Batley *v.* Kynock (No. 1) 90

3. —— *Practice—Trial of Issues—Particulars of Breaches.*] Although upon the trial of questions in a patent suit the Plaintiff's particulars of breaches should give the Defendant full, fair, and distinct notice of the case intended to be made against him, it is not necessary, in the case of an alleged infringement of a patent for improvements of a particular article (*e.g.*, cartridges), for the particulars to point out the precise portions of the specification alleged to have been infringed when the thing alleged to be an infringement has been made an exhibit. Batley *v.* Kynock (No. 2) [229

PETITION FOR ADJUDICATION—*Bankruptcy—Evidence in support of Petition—Delegation of Judicial Authority—Deputy-Registrar—Power to make Adjudication—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 8, 10, 67—*Bankruptcy Rules*, 1870, *rr.* 1, 3, 36, 37—*Bankruptcy Forms*, 1870, *Nos.* 11, 12.] At the hearing of a bankruptcy petition, even though the respondent has given no notice of his intention to shew cause against the petition, and does not appear, the allegations contained in the petition must be supported by further evidence than the common affidavit (No. 11).—That affidavit is made only for the purpose of justifying the sealing of the petition.—The Deputy-Registrar of a County Court may have delegated to him by the Judge the power of making an adjudication of bankruptcy. *Ex parte* Lindsay. *In re* Lindsay - - - 52

2. —— *Bankruptcy—Notice to Debtor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 8, 125—*Bankruptcy Rules*, 1870, *rr.* 61, 65, 266, 267.] An adjudication of bankruptcy made under the provisions of Rule 266 of the *Bankruptcy Rules*, 1870, must, like any other adjudication, be made upon a petition presented by a creditor, and after service of the petition upon the debtor in the ordinary way. *Ex parte* Stebbing. *In re* Stebbing [441

PIRACY—Copyright in designs - - 623
See Copyright in Designs.

PLEADING—Multifariousness - - 56
See Multifariousness.

—— Parties—Bankrupt Defendant - 171
See Bankrupt Defendant.

POLICY — Fire insurance — Misdescription of buildings - - - - 485
See Misstatement in Policy.

—— Life insurance - - - - 607
See Restraining Action on Policy.

POSSESSION—Part performance—Parol—Agreement to let - - - - 174
See Frauds, Statute of. 1.

POSSESSORY TITLE—Foreshore - - 558
See Foreshore.

POWER—Advancement—Preferment—Payment of debts - - - - 166
See Advancement. 1.

—— Special—Appointment to trustees for object of power - - - - 16
See Appointment to Trustees.

PRACTICE—Administration summons—Service
See Administration Summons. [467

—— Bankruptcy—Adjudication under Rule 266 [441
See Petition for Adjudication. 2.

—— National Debt Commissioners—Re-transfer of stock - - - - 430
See National Debt Commissioners.

—— Patent suit - - - 72, 90, 229
See Patent Suit. 1, 2, 3.

—— *Pro confesso*—Foreclosure suit—Service of decree - - - 48, 49, n.
See Pro Confesso. 1, 2.

—— Trustee Act - - - - 352
See Trustee Act.

PREFERENCE SHARES - - - 358
See Increase of Capital of Company.

PREFERMENT — Advancement — Payment of debts - - - - - 166
See Advancement. 1.

PRESUMPTION—Grant of foreshore - 558
See Foreshore.

—— Marriage—Reputation—Conduct - 98
See Evidence of Marriage.

PROBATE COURT—Injunction against proceedings in - - - - 327
See Agreement not to contest Will.

PRO CONFESSO—*Practice—Foreclosure—Decree pro Confesso against some of the Defendants—Service of Decree out of the Jurisdiction ordered to be effected by Advertisement—Cons. Ord. xxii., rr.* 11, 12, 15.] In a foreclosure suit, by a mortgagee who had been in possession twelve years, against several Defendants, trustees and beneficiaries under the will of the original mortgagor—some of whom were out of the jurisdiction in *America*—the bill having been ordered to be taken *pro confesso* against the Defendants out of the jurisdiction, and at the hearing none of the Defendants appearing, service of copy of the decree upon the Defendants out of the jurisdiction was permitted to be made by advertisement in two *London*, and one American, newspapers. Hyde *v.* Large - 48

2. —— *Foreclosure Suit—Absconding Defendant—Service of Decree by Advertisement—Cons. Ord. xxii., rr.* 11, 12, 15.] Where a decree had been made *pro confesso* against a Defendant in a foreclosure suit who could not be found, service of notice of the decree was allowed to be made by advertisement in the *Gazette* and *London* papers. Canter *v.* Wodehouse - - - 49, n.

PRODUCTION OF DOCUMENTS—*Foreign Government Loan—Mortgage—Scrip and Bonds.*] A foreign government employed *K. & F.*, as agents in *London*, to bring out a loan on the English market, and to issue scrip certificates to the subscribers, and to exchange such scrip for bonds upon the amount subscribed being fully paid. The government employed *E. & Co.* as their agents and bankers, with power to receive from *K. & F.* the sums subscribed. Subsequently bonds in the hands of *K. & F.* were pledged by the President of the government to *E. & Co.*, but the validity of this security was disputed by the government. The government filed a bill against *K. & F.*, *E. & Co.*, and others, for accounts of the dealings connected with the issue of the loan.—Upon motion that a member of the firm of *K. & F.*, upon cross-examination in the cause, should produce certain documents to the production of which *E. & Co.* objected:—*Held*, that the scrip certificates and the scrip book in which the certificates were entered must be produced, but not the bonds themselves, since the foreign government might, by knowing the numbers of the bonds, use their information to the prejudice of *E. & Co.*, their mortgagees, and the knowledge of the numbers of the bonds was not shewn to be relevant to the suit. Republic of Costa Rica *v.* Erlanger - - - - - 33

PROFITS—Leasehold collieries - - 395
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PROMISSORY NOTE—Verbal promise to indemnify drawer - - - - 198
See Frauds, Statute of, 2.

PROOF IN BANKRUPTCY—Composition—Power of trustee to reject proof - - 261
See Trustee in Composition.

PROOF IN WINDING-UP—Bill of exchange—Securities - - - - 1
See Securities for Bills of Exchange.

PROSECUTION UNDER DEBTORS ACT—*Fraudulent Debtor—Representation by a Creditor to the Court—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 13, 16.] The representation by a creditor to the Court, mentioned in sect. 16 of the *Debtors Act*, 1869, as a foundation for an order directing the prosecution of a bankrupt for alleged offences under the Act, must be made in writing, supported by proper evidence, and filed with the proceedings in the bankruptcy. *Ex parte* Leonard. *In re* Leonard - - - - - 269

PUBLIC POLICY — Covenant to assign future patents - - - - 462
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PURCHASE-MONEY—Railway company—Lands Clauses Act - - - - 457
See Costs under Lands Clauses Act.

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QUALIFICATION—Director of company - 353
See Director's Qualification.

RAILWAY COMPANY—Compulsory powers 83, [93
See Compulsory Powers. 1, 2.

—— Lands Clauses Act—Costs - - 457
See Costs under Lands Clauses Act.

REAL ESTATE—Conversion—Devise for sale 113
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REDUCTION INTO POSSESSION—Wife's *chose in action* - - - - 369
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REDUCTION OF PROOF—Winding-up—Securities for bills of exchange - - 1
See Securities for Bills of Exchange.

RÉFRESHER—Taxation of costs - - 473
See Taxation of Costs.

REINVESTMENT OF PURCHASE-MONEY—*Lands Clauses Act—Purchase-money of Freeholds—Investment in Leaseholds—Trustees for Charity.*] The purchase-money of freeholds paid into Court under the *Lands Clauses Consolidation Act* may be invested in the purchase of leaseholds if the persons paying it in are charitable trustees having an absolute legal title. *In re* Rehoboth Chapel [180

—— Costs - - - - - 457
See Costs under Lands Clauses Act.

REMOTENESS—Gift to children at twenty-five
See Gift at Twenty-five. [286

RENT-CHARGE—Apportionment - - 271
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REPUTATION — Marriage — Preponderance of evidence - - - - 98
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RES JUDICATA—Action and suit on life policy [607
See Restraining Action on Policy.

RESCISSION OF CONTRACT—Conditions of sale
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—— Realty—Marshalling assets - - 96
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RESOLUTION—Liquidation by arrangement—Close of liquidation — Discharge of debtor - - - - 245
See Close of Liquidation.

RESTRAINING ACTION ON POLICY—*Practice—Jurisdiction—Res Judicata—Injunction—Suit in Equity—Action at Law in reference to same Subject-matter.*] A Plaintiff in equity filed his bill stating that a policy had become void at law, and claiming to have it treated as valid in equity.—After bill dismissed the same Plaintiff sued at law on the policy:—*Held*, that a bill would lie to restrain the action, and injunction granted accordingly. Lord Tredegar *v.* Windus - 607

RESTRAINT OF MARRIAGE—*Will—Second Marriage of a Man.*] Bequest to husband and wife for their lives and the life of the survivor, with a gift over in the event of the husband surviving and marrying again:—*Held*, that the attempted defeasance of the husband's life interest was void as a condition subsequent in restraint of marriage. Allen *v.* Jackson - - - - 631

RESULTING TRUST—Transfer into joint names of transferor and son-in-law - 250
See Advancement. 2.

RETAINER BY EXECUTOR—*Insolvent Estate—Exercise for Benefit of Trust Estate.*] The administrator of a sole trustee who has died insolvent is entitled, in respect of the trusteeship which has devolved upon him as such administrator, to exercise the legal right of retainer in respect of any debt due to the trust estate, and is bound to do so if required by the *cestuis que trust*. Sander *v.* Heathfield - 21

RETROSPECTIVE EFFECT—Bankruptcy Act, 1869 - - - - - 433
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RIPARIAN OWNER—Diversion of part of stream
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SALE—By Court—Conversion - - 113
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—— By Court—Invalidity—Conditions of sale
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—— Partition suit - - - - 595
See Partition Suit.

SATISFACTION OF BILL OF SALE—*Notice of Act of Bankruptcy—Payment of a prior Mortgage—Satisfaction entered up.*] At the time when a bill of sale was executed, the mortgagee had notice of an act of bankruptcy committed by the mortgagor, upon which he was afterwards adjudicated a bankrupt. The money secured by the deed consisted in parts of a sum paid by the mortgagee in discharge of the claim of the holder of two prior registered bills of sale executed before the act of bankruptcy was committed. The old bills of sale were not transferred to the new mortgagee, and satisfaction of them was entered up. The new bill of sale was registered:—*Held*, that the new bill of sale was valid as against the trustee in the bankruptcy to the extent of the sum paid to the prior mortgagee. *Ex parte* Harris. *In re* James - - 253

SCRIP CERTIFICATES—Foreign loan - 33
See Production of Documents.

SECOND MARRIAGE—Restraint of - 631
See Restraint of Marriage.

SECURITIES FOR BILLS OF EXCHANGE—*Insolvency of all Parties to Bills—Application of Securities—Ex parte Waring—Reduction of Proof.*] All the parties to a bill of exchange (the payment of which was secured as between some of them) became insolvent, one of them (a company) being ordered to be wound up. The security was realized, and the proceeds paid to the bill-holder upon the principle of *Ex parte Waring* (19 Ves. 345). After the bill had matured, but before the security had been realized, the holder had proved against the company for the full amount:—*Held*, that the proof must be reduced by the amount received by the bill-holder from the security, and any dividends received on the excess of the original over the reduced proof must be refunded. *In re* Barned's Banking Company. *Ex parte* Joint Stock Discount Company - - 1

"SECURITIES FOR MONEY"—*Construction of Will—Bankers' Deposit Notes.*] A testatrix, having money placed with her bankers on deposit notes, being receipts for the money "to account for on demand," gave "all bonds, promissory notes, and other securities for money in my hands at the time of my decease, and all moneys due thereon," upon certain trusts:—*Held*, that the bankers' deposit notes were not included in this bequest, but passed under a residuary clause. Hopkins *v.* Abbott - - - - - 222

SEIZURE AND SALE—Execution creditor 438
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SEPARATE ESTATE—Married Women's Property Act - - - - - 295
See Married Women's Property Act.

SEPARATION DEED—*Return to Cohabitation—Wife's Equity to a Settlement.*] The Plaintiff was entitled at the time of her marriage to a sum of money secured by the promissory note of her brother. A deed of separation between the Plaintiff and her husband was executed, in which the Plaintiff's brother covenanted that he would hold the money upon trust for the wife and husband successively for life, and then for the child of the marriage. The husband and wife, after separation, returned to cohabitation, and the husband became bankrupt:—*Held*, upon demurrer to a bill by the wife and child to have the money held upon the trusts of the separation deed, or to be declared entitled to an equity for a settlement, that as the deed contained provisions beyond the purview of a mere separation deed it could be supported as a valid settlement, and that the brother having by the deed made himself a trustee of the legal debt, it became subject to the wife's equity to a settlement. Demurrer overruled. Ruffles *v.* Alston. [539

SERVICE—Administration summons - 467
See Administration Summons.
—— Decree—*Pro confesso*—Advertisements 48, [49, n.
See Pro Confesso. 1, 2.
—— Out of jurisdiction—*Pro confesso* - 48
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—— Summons for examination—Bankruptcy 131
See Discovery of Bankrupt's Property.

SET-OFF IN WINDING-UP—*Company—Winding-up—Contributory—Set-off against Call made before Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 101.] In 1873 a call to the amount of £432 was made on a shareholder of a limited company to whom the company was indebted in £196. No part of the call was paid, and in 1874 the company was wound up under supervision :—*Held*, that the debt could not be set off against the call.—*Calisher's Case* (Law Rep. 5 Eq. 214) discussed. *In re* Stranton Iron and Steel Company. Barnett's Case - 449

SETTLEMENT—Alien married in *England* 334
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—— Tenant for life—Calls on shares - 69
See Lien for Calls.
—— Voluntary bankruptcy - - 433
See Voluntary Settlement.

SHARES—Calls—Lien—Tenant for life - 69
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—— Director's qualification - - 353
See Director's Qualification.
—— Preference—Increase of capital of company. [358
See Increase of Capital of Company.

SHERIFF—Possession of, under execution—Reputed ownership - - - 264
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SHORE—Title to foreshore - - - 558
See Foreshore.

SOLICITOR—Fraudulent transaction—Parties to suit - - - - - 171
See Bankrupt Defendant.
—— Negligence—Investigation of title - 627
See Negligence of Solicitor.

SOLICITOR'S CLERK—Attendance at cross-examination - - - - 473
See Taxation of Costs.

SOVEREIGN ACT OF STATE—*Annexation of the Kingdom of Oudh—Rights of the East India Company—Want of Jurisdiction—Improper Tribunal—Demurrer.*] The Plaintiffs, who represented certain creditors of the King of *Oudh* in respect of a debt contracted in 1794, sued the Secretary of State for *India*, claiming to be entitled to a charge upon the revenue of the territory of *Oudh* :—*Held*, upon demurrer, that as the debt was one which there were no means of enforcing against the King of *Oudh* before the annexation in 1856, neither could it have been enforced after the annexation against the *East India Company* :—*Held*, also, that the annexation of *Oudh* having been a sovereign act of state by the *East India Company* as trustees for the British Government, that act could not be reviewed by any municipal

SOVEREIGN ACT OF STATE—*continued.*
Court, and the bill was therefore not sustainable :—*Held*, also, that the Plaintiffs being natives of *India*, the subject-matter being in *India*, and the Defendant being capable of being sued in *India*, an English Court of Equity was not the proper tribunal to try the question between the parties :—*Held*, also, that the staleness of the demand and the impracticability of giving effect to any declaration of right were grounds for allowing the demurrer. Doss *v.* Secretary of State for India in Council - - - - 509

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SUBMISSION TO ARBITRATION—*Practice—Partnership Articles—Suit for Accounts—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11—*Costs.*] The Plaintiff instituted a suit to take the accounts of a partnership between himself and the Defendant, the terms of the partnership being that the Plaintiff was to receive one-twelfth of the profits and to bear one-twelfth of the losses, and that the Defendant was to receive and bear the remaining eleven-twelfths. The partnership articles contained an arbitration clause; and an order was made in the suit, under sect. 11 of the *Common Law Procedure Act*, 1854, that the matters in difference between the parties be referred to arbitration and the proceedings in the suit stayed, the costs being reserved. Under this order an award was made finding a considerable sum due to the Plaintiff:—*Held*, that the costs of both parties of the suit, reference, and award, ought to be taxed and paid as to one-twelfth thereof by the Plaintiff and as to eleven-twelfths by the Defendant. Newton *v.* Taylor - - - - 14

2. —— *Partnership Articles—Suit for Accounts—Common Law Procedure Act*, 1854, *s.* 11.] Articles for a partnership for one year contained an arbitration clause. The partnership was continued beyond the year and ultimately dissolved:—*Held*, that the arbitration clause was in force, and proceedings in a suit for accounts by one of the partners against the other stayed under sect. 11 of the *Common Law Procedure Act*, 1854. Gillett *v.* Thornton - - - - 599

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"SURVIVOR"—Read "other" - - 320
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SURVIVORSHIP—*Construction of Settlement—"Survivor" to be read "other."*] The word "survivor" in one of the clauses of a settlement may be read "other" in order to effectuate the clear intention of the parties, notwithstanding that the same word may require to be read in its natural sense in other clauses of the same settlement referring to the same fund. *In re* Palmer's Settlement Trusts - - - - - 320

TAXATION OF COSTS—*Party and Party—Explanatory Drawings—Solicitor's Clerk—Counsel's Fees—Attendance on Cross-examination—Employment of three Counsel—Refreshers.*] On taxation of costs as between party and party, the only costs chargeable against the unsuccessful party are such as are necessary for the conduct of the litigation. Therefore, in a suit to restrain the infringement of a patent, in which the Defendant had set up several cases as anticipations, the costs of drawings of exhibits for the purpose of affixing to the margin of counsel's briefs were disallowed. —Charges for the attendance of a solicitor's clerk in addition to the solicitor on cross-examination will not in any case be allowed.—The charge to be allowed for counsel's fees for cross-examination

TAXATION OF COSTS—*continued.*
will not ordinarily exceed £5 5*s.* a day after the first, for which a larger fee may be allowed in heavy cases; and where the case is long and complicated, as much as £7 7*s.* a day may be allowed for the subsequent days.—A moderate fee, such as £7 7*s* a day, may be allowed for a scientific witness to read up a case for the purpose of giving evidence.—The rule that charges will not be allowed for employing more than two counsel will only be departed from in exceptional circumstances, and in determining whether such circumstances exist the amount of interest which the successful party has in maintaining the suit may be taken into consideration.—The rule of the Common Law Courts as to refreshers applies to the hearing of heavy suits in Chancery, whether on written or *viva voce* evidence; but the brief fee may fairly be taken to cover two days, after which refreshers should be allowed. Smith *v.* Buller. - - - - - 473

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TRUST—Declaration of—Intended transfer—Voluntary gift - - - - 233
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TRUSTEE ACT, 1850 (13 & 14 *Vict. c.* 60), *ss.* 15, 32, 34—*Trustee of Leaseholds—Intestacy—Vesting Order.*] Where a trustee of leaseholds has died intestate and has no legal personal representative, and a new trustee has been duly appointed in his place, the Court will not reappoint him trustee under sect. 32 of the *Trustee Act*, 1850, merely for the sake of making a vesting order under sect. 34. —*Re Mundel's Trust* (8 W. R. 683) not followed.—The Court will, however, appoint an additional trustee under sect. 32, and will thereupon make a vesting order under sect. 34. *In re* Driver's Settlement - - - - - 352

TRUSTEE IN COMPOSITION — *Composition — Powers of Trustee—Rejection of Proof—Reduction of Amount—Inquiry before Registrar—Bankruptcy Rules*, 1870, *rr.* 279, 311, 313.] The trustee appointed under Rule 279 of the *Bankruptcy Rules*, 1870, to receive and distribute a composition, has no power to reject *in toto* the proof of a creditor who is included in the debtor's statement. —But, if the amount of the debt be in dispute between the debtor and the creditor, the trustee is entitled to an inquiry to ascertain what is really due. *Ex parte* Botting. *In re* Bostel - 261

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VOLUNTARY SETTLEMENT — *Trader — Invalidity—Retrospective Effect of Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 91—*Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 126—*Bankruptcy Repeal Act*, 1869 (32 & 33 *Vict. c.* 83), *ss.* 2, 20.] Sect. 91 of the *Bankruptcy Act*, 1869, applies to settlements executed before, as well as after, the Act came into operation.—The corresponding sect. 126 of the *Bankrupt Law Consolidation Act*, 1849, is entirely repealed by the *Bankruptcy Repeal Act*, 1869, and has no operation upon a settlement executed by a person who is adjudged a bankrupt after the *Bankruptcy Act*, 1869, came into operation, even though the settlement was executed before that Act came into operation. *Ex parte* Dawson. *In re* Dawson [433

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WASTE OF FOREST—*Right of Common Appurtenant—Suit against Lord of Manor by Owners and Occupiers of Land—Common of Vicinage—Inclosure—Injunction.*] In a suit by the owners and occupiers of lands in *Epping Forest* against the lords of the several manors within the forest, claiming to be entitled, in right of and as appurtenant to their several lands and tenements, to common of pasture for cattle, levant and couchant, on their respective tenements over all the waste lands of the forest, and praying an injunction to restrain the inclosure of any part of the said waste:—*Held*, on the evidence in the case, that such right had been established; that the Defendants had failed to shew that the right of common was only common of vicinage; that the other grounds of defence wholly failed; and that any further inclosure of the waste must be restrained.—Where *A.*, *B.*, and *C.* are three vills with commons, *B.* lying between *A.* and *C.*, there can be common of vicinage between *A.* and *B.* and between *B.* and *C.*, but not between *A.* and *C.*, and, *semble*, there cannot be common of vicinage between more than two townships. COMMISSIONERS OF SEWERS *v.* GLASSE - - - - 134

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WIFE'S CHOSE IN ACTION—*Wife's Property—Reduction into Possession.*] A woman having a sum of money deposited with a merchant, and standing in her name, married a man whom she afterwards accompanied on a voyage, and both were drowned at the same time. The money was transferred by the merchant into the names of the husband and wife; but the only direction given to the merchant by the husband was to keep this property separate from his other moneys. The husband by his will, after reciting that his wife had previously to her marriage deposited with the merchant this money, which was standing in her name, disposed of the property as his own:—*Held*, that the husband had done no act to reduce the wife's money into possession, and that it would go to her personal representatives. SCRUTTON *v.* PATTILLO - - - - 369

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—— Proof—Bill of exchange—Securities for 1
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WINDING-UP PETITION—*Company—When it will be restrained—Solvent Company—Disputed Debt.*] A creditor of a solvent company, whose debt is *bonâ fide* disputed will be restrained from presenting a petition for winding up the company.—A contractor entered into a contract with a company for the execution of certain works for the sum of £290,000, of which £200,000 was to be paid in cash, and the rest in paid-up shares. The contractor had received £203,000 in cash, and a large number of shares, but he claimed to be entitled to a further sum of £30,000. The company disputed the claim, and alleged, on the contrary, that the contractor had been largely overpaid. The contractor threatened to present a petition to wind up the company, and served on the company a demand under the 80th section of the *Companies Act*, 1862:—*Held*, that there being no proof of the company being insolvent, and the alleged debt of the contractor being *bonâ fide* in dispute, the contractor must be restrained from presenting a petition to wind up the company. CADIZ WATERWORKS COMPANY *v.* BARNETT - - 182

2. —— *Company—Statement in Petition that Petitioner had not paid Calls—Demurrable Petition—Offers of Payment not amounting to Tenders.*] A Petition for winding up a company stated that a call had been made upon the Petitioner, which he had not yet paid, for reasons which he stated, but that he was willing to set apart, secure, or pay the amount in such manner as to the Court might seem just:—*Held* (following the decision in *In re European Life Assurance Society* (Law Rep. 10 Eq. 403)), that the Petition was unsustainable on the face of it, and must be dismissed.—From the evidence it appeared that, the Petition having been presented on the 2nd of February, and answered on the 3rd for hearing on the 13th, the

WINDING-UP PETITION—*continued.*
Petitioner's solicitor, on the 3rd, wrote to the secretary of the company stating that he had presented the Petition, and offering at once to pay the amount of the call if the directors would give an undertaking not to deal with the money until after the result of the Petition was seen. This offer having been by letter on the 11th declined, on the 12th the Petitioner's solicitor tendered to the company's solicitors a cheque on his own bankers for the amount of the call and interest, and informed him that the company's costs would be paid when ascertained:—*Held*, that neither of these offers amounted to a legal tender, or satisfied the Petitioner's default. The Petition being in the position of a bill that is demurrable, the costs of the Respondents' affidavits in opposition were not allowed. *In re* Steam Stoker Company **416**

3. —— *Company—Creditor's Petition—Disputed Debt—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 80.] The omission of a joint stock company to comply with a statutory notice requiring payment of a debt, served by a creditor on the company under the *Companies Act*, 1862, s. 80. sub-s. 1, is not "neglect" within the meaning of that sub-section, unless there is no reasonable cause for the omission.—A creditor who has served such a notice is not entitled to a winding-up order if the company *bonâ fide* dispute the debt, and there is

WINDING-UP PETITION—*continued.*
no evidence of the insolvency of the company (other than the non-compliance with the notice), and insolvency is denied on the part of the company.—Where a creditor whose debt was disputed served such a notice, and at the expiration of three weeks filed a Petition to wind up the company under circumstances which, in the opinion of the Court, shewed that the object of the Petition was not to obtain a winding-up order, but to put pressure on the company:—*Held*, that the Petition must be dismissed with costs. *In re* London and Paris Banking Corporation - - **444**

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